IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 370

ELLIOTT GOLDEN, as Acting District Attorney of the County of Kings,

Appellant,

against

SANFORD ZWICKLER,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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This is an appeal from a judgment and order of a three-judge court of the United States District Court for the Eastern District of New York, entered on June 18, 1968, declaring § 457 of the New York State Election Law to be unconstitutional and enjoining the appellant from enforcing the statute (A. 59-60). The statute prohibits the distribution in quantity of anonymous campaign literature (A. 30). Appellee's motion for a three-judge district court was granted on May 20, 1966 (A. 23). That court's dismissal of the complaint is dated September 29, 1966. This Court reversed that order on December 5, 1967. *Zwickler* v. *Koota,* 389 U. S. 241. At the request of the District Court additional briefs were then filed without any further

argument. On May 6, 1968 the District Court rendered its decision. The order was entered on June 18, 1968 (A. 58-60). On July 8, 1968, Mr. Justice Harlan stayed the order of the District Court provided the appeal was docketed by August 5, 1968 (A. 62). This order was complied with and probable jurisdiction was noted on October 14, 1968 (A. 64).

Opinions Below

The opinion granting the motion to convene a three-judge court (A. 18-21) is not reported. The opinion of the three-judge court is not yet reported (A. 29-57).

Jurisdiction

The order of the District Court was entered on June 18, 1968 (A. 58-60). The notice of appeal was filed on July 3, 1968 (A. 4). Probable jurisdiction was noted on October 14, 1968 (A. 64).

The jurisdiction of this Court rests on 28 U.S.C. § 1253.

Statute Involved

New York Election Law, § 457 (formerly New York Penal Law, § 781-b):

> "§ 457. Printing or other reproduction of certain political literature. No person shall print, publish, reproduce or distribute in quantity, nor order to be printed, published, reproduced or distributed by any method any handbill, pamphlet, circular, post card, placard or letter for another, which contains any statement, notice, information, allegation or other material concerning any political party, candidate, committee, person, proposition or amendment to the state constitution, whether in favor of or against a political

party, candidate, committee, person, proposition or amendment to the state constitution, in connection with any election of public officers, party officials, candidates for nomination for public office, party position, proposition or amendment to the state constitution without also printing or reproducing thereon legibly and in the English language the name and post-office address of the printer thereof and of the person or committee at whose instance or request such handbill, pamphlet, circular, post card, placard or letter is so printed, published, reproduced or distributed, and of the person who ordered such printing, publishing, reproduction or distribution, and no person nor committee shall so print, publish, reproduce or distribute or order to be printed, published, reproduced or distributed any such handbill, pamphlet, circular, post card, placard or letter without also printing, publishing, or reproducing his or its name and post-office address thereon. A violation of the provisions of this section shall constitute a misdemeanor.

The term 'printer' as used in this section means the principal who or which by independent contractual relationship is responsible directly to the person or committee at whose instance or request a handbill, pamphlet, circular, post card, placard or letter is printed, published, reproduced or distributed by such principal, and does not include a person working for or employed by such a principal. [Chap. 1031, L. 1965, eff. Sept. 1, 1967. Subject matter formerly contained in Sec. 781-b, Penal Law.]''

Questions Presented

1. Does New York Election Law § 457 prohibiting the distribution in quantity of anonymous campaign literature during an election campaign abridge freedom of expression so as to constitute a violation of the United States Constitution?

2. Did the instant case present a case of controversy within the meaning of Article III of the United States Constitution warranting the granting of declaratory relief?

3. Was the granting of injunctive relief proper in the instant case?

Statement of the Case

Appellee commenced this proceeding in the United States District Court for the Eastern District of New York in May, 1966, seeking declaratory and injunctive relief against the enforcement of New York Penal Law § 781-b* prohibiting the distribution in quantity of anonymous campaign literature (A. 7-12).

The complaint alleged that appellee desired and intended to distribute in quantities of more than a thousand copies anonymous political leaflets with regard to the election campaign of 1966 "and in subsequent election campaigns or in connection with any election of party officials, nomination for public office and party position that may occur subsequent to said election campaign of 1966" (A. 9). It alleged that appellee wished to make such distribution of a leaflet "prepared by and at the instance of a person other than the plaintiff" (A. 9) because of his belief that the statute forbidding such distribution violates the First and Fourteenth Amendments to the Constitution "in that it is an infringement of the freedom of expression" (A. 9).

The complaint sought federal relief enjoining enforcement of the statute not because appellee was being subjected to harassment of any sort and not because any prosecution was pending or imminent but because "[t]he said leaflet is embraced within the scope and intendment of the statute" (A. 9), because the District Attorney "is a

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* Penal Law, § 781-b is now Election Law § 457 and will be referred to as such.

diligent and conscientious public officer and pursuant to his duties intends or will again prosecute the [appellee] . . . for his acts of distribution" (A. 9-10) and because, in 1964, appellee was charged with distributing an anonymous leaflet in connection with the Congressional election to be held on November 3, 1964, about four days after the date of distribution (A. 7-8). The leaflet called on then U. S. Representative Abraham Multer, now a State Supreme Court Justice, to explain why he had voted against cutting off aid to the United Arab Republic and had announced his preference for a watered down condemnation of religious bigotry over a denunciation of Soviet anti-semitism. Appellee was found guilty after a trial at which he presented no evidence. *People* v. *Zwickler* (Crim. Ct. N.Y.C. Kings Co. Feb. 10, 1965, unreported) (A. 8). The judgment of conviction was "unanimously reversed on the facts" upon the failure of the People "to establish that defendant distributed anonymous literature 'in quantity'." *People* v. *Zwickler* (Sup. Ct. App. Term, Kings Co. April 23, 1965, unreported) (A. 8). The reversal was affirmed without opinion by the New York Court of Appeals. *People* v. *Zwickler,* 16 N. Y. 2d 1069, 266 N.Y.S. 2d 140 (1965).

Other than the specific reference to Congressman Multer, the complaint alleged that the appellee:

> "desires and intends to distribute in the Borough of Brooklyn, County of Kings, New York . . . the anonymous leaflet herein described . . . and similar anoymous leaflets, all prepared by and at the instance of a person other than the plaintiff. The said distribution is intended to be made at any time during the election campaign of 1966 and in subsequent election campaigns or in connection with any election of party officials, nomination for public office and party position that may occur subsequent to said election campaign of 1966." (A. 9).

By order dated May 20, 1966, the Hon. George Rosling of the United States District Court for the Eastern District of New York granted appellee's motion to convene a statutory three-judge court. The Court, consisting of the Hon. Irving R. Kaufman, Circuit Judge of the United States Court of Appeals for the Second Circuit, Hon. Joseph Zavatt, Chief Judge of the United States District Court for the Eastern District of New York and Hon. George Rosling, heard appellant's motion to dismiss the complaint and appellee's motions for injunctive and declaratory relief on June 9, 1966.

On September 19, 1966, the Court filed its opinion in favor of the appellant, Judge Rosling dissenting. The majority held that the Court should abstain from a decision on the merits of the application and dismissed the complaint. *Zwickler* v. *Koota,* 261 F. Supp. 985.

On December 5, 1967, this Court reversed the order and remanded the action for disposition by the District Court directing the Court to consider whether or not the complaint alleged a case or controversy or had become moot, whether declaratory judgment was a proper remedy in the instant case, whether the statute in question was repugnant to the United States Constitution, and whether, if it was, injunctive relief should be granted in addition to declaratory relief. *Zwickler* v. *Koota,* 389 U. S. 241.

On May 6, 1968, the District Court rendered its decision. After setting forth the provisions of the statute and the previous experience of appellee with the statute, the Court turned to the question of whether the facts presented a controversy of sufficient immediacy to support an action for declaratory judgment (A. 30). The Court first said that the statute was not one which had not been invoked by the State and, thus, held that it did not fall within *Poe* v. *Ullman,* 367 U. S. 497. Moreover, the Court held that in a case where First Amendment freedoms are in question "the chill of a penal restraint on utterance blights

those freedoms by its mere presence" (A. 32). The Court noted that the statute had been amended several times and had recently [1962] been moved from the Penal Law to the Election Law and its scope widened (A. 32-33).

The Court refused to consider that because Congressman Multer had become Supreme Court Justice the case was moot since "when this action was initiated the controversy was genuine, substantial and immediate, even though the date of the election to which the literature was pertinent had already passed" (A. 33).

The Court said that, rather than risk another arrest, appellee "chose, as a prudent alternative to the martyrdom that he might have embraced, to file his current complaint in this court" (A. 35). The Court regarded the elevation of Mr. Multer as a "fortuitous circumstance" (A. 36) and said that this did not moot "the plaintiff's further and far broader right to a general adjudication of unconstitutionality" (A. 36). Without taking any testimony, the Court concluded:

> "We see no reason to question Zwickler's assertion [at the outset of the action] that the challenged statute currently impinges upon his freedom of speech by deterring him from again distributing anonymous handbills. His own interest as well as that of others who would with like anonymity practice free speech in a political environment persuade us to the justice of his plea." (A. 36)

The Court relied on the decision of this Court in *Evers* v. *Dwyer*, 358 U. S. 202 (A. 36-37).

Having thus quickly and without proof or argument disposed of the preliminary questions referred to in this Court's remand, the Court moved on to consider the constitutionality of the statute. Imputing to the attorney for appellant a change in position, the Court noted that it was appellant's position that the statute was not concerned

with whether or not the content of the material to be distributed could be prosecuted criminally. The Court held that that position was untenable in light of the decision of this Court in *Talley* v. *California*, 362 U. S. 60 (A. 38-39). The Court strangely found support for its reading of *Talley* in the *New York* decision of *People* v. *Mishkin*, 17 A. D. 2d 243 (1st Dept. 1962), *aff'd* 15 N. Y. 2d 671, 204 N. E. 2d 209 (1964), in which the courts of New York struck down a statute requiring every publication other than newspapers and magazines to print the true name and address of the publisher or printer.

The Court felt that appellant's "problem has, indeed, been compounded by a negative legislative action" (A. 41). It referred to the repeal by New York of criminal libel sections and said that:

> "One may now, therefore, in the State of New York with a curious impunity, save for exposure to a claim for civil damages, circulate an anonymous tract which falsely charges a clergyman with adultery, but one dare not in an anonymous handbill truthfully publicize the sale of elective office lest he be held to answer criminally." (A. 41)

The opinion went on to say that although anonymity alone was forbidden:

> "Government assistance to a public figure, however, in ferreting out a 'traducer' whom he may the more readily identify and from whom he may seek civil damages as balm for his individual smart at criticism of his official performance weighs in the balance as too high a toll to be exacted from First Amendment freedom of expression for all." (A. 41)

The Court also rejected appellant's argument that the statute promoted enforcement of the anti-corruption provisions of the Election Law. It said simply that those

sections did not indicate a legislative purpose that their enforcement should infringe the First Amendment. The Court then acknowledged that the possibility of civil damages for criticism had greatly diminished but, nevertheless, remarked that "the threat which chills free expression remains, 'the fear of damage awards'" (A. 43).

The Court considered in this context the cases of *Bates* v. *City of Little Rock,* 361 U. S. 516 and *NAACP* v. *State of Alabama,* 357 U. S. 449, and characterized them as cases involving the invalidity of statutes as applied. The Court said that in contrast to *Talley,* those cases involved legitimate state purposes which were, nevertheless, not sufficiently aided by the statute in question to justify overriding the First Amendment (A. 44-45). The Court apparently held that, just as in the *NAACP* case the statute in question requiring disclosure bore no reasonable relationship to the taxing power, so in the instant case the statute could not be justified by the duty of compliance with corrupt practices statutes in election campaigns. The Court distinguished *United States* v. *Harriss,* 347 U. S. 612 and *United States* v. *Rumely,* 345 U. S. 41, as concerning "special situations in which within a narrowly limited area encroachment upon First Amendment anonymity is tolerated so that an exigent national interest may be safeguarded" (A. 46).

The Court ignored the existence of a substantially identical federal statute as that involved at bar (18 U.S.C. § 612) and a District Court opinion upholding that federal statute and distinguishing *Talley* (*United States* v. *Scott,* 195 F. Supp. 440). Instead, the Court simply said that no vital national interest required the legislation in question and discussed several recent cases purporting to uphold its conclusion. *United States* v. *Robel,* 389 U. S. 258; *Lamont* v. *Postmaster General of United States,* 381 U. S. 301; *Mills* v. *Alabama,* 384 U. S. 214 (A. 49-52).

Finally, the Court held that the statute was to be declared invalid and, without any discussion whatsoever,

stated that "injunctive relief to implement such declaration of invalidity is decreed" (A. 52), failing to pay any special attention to the language of this Court's opinion on remand regarding the demand for injunctive relief upon which appellee predicated his case.

The Court declined to accept appellant's offer of a supplemental affidavit and exhibit (A. 52).

Summary of Argument

Election Law § 457 is not an unreasonable restraint of free expression. It is not such a restraint at all and, indeed, promotes First Amendment considerations. Time and experience have forcefully taught that there is a substantial need for the legislation, and that the reasons for the statute are relevant and urgent. The legislation is no broader than the need it serves, and no prejudice can result from the required limited disclosure. The statute protects the integrity of the electoral process by facilitating the enforcement of various anti-corruption provisions in the New Yok Election Law requiring reports of campaign receipts and expenditures.

Moreover, in an election situation, where the public is being asked to take a definite course of action, it is entitled to know who is urging one position or another and what campaign tactics are being employed by each side. Time is of the essence in an election campaign. Not all charges and countercharges can be answered before the election but it is of indispensable importance to the electorate that it be able to evaluate for itself any statement made in the light of its source. The New York experience, as outlined in the report of the Special Committee on Campaign Practices, highlights the necessity for the legislation,

By limiting itself to the campaign context, the New York statute is unlike the broad disclosure statutes previously struck down by this Court. The limitation of the statute is demonstrated by the fact that none of the well-known

anonymous literature of the past referred to by appellee falls within its proscription. Furthermore, appellee has not demonstrated any realistic possibility of reprisal resulting from disclosure. As the District Court acknowledged, criminal libel no longer exists in New York as a penal offense. Civil libel and invasion of privacy suits by public officers are now limited in all but the most outrageous cases and there is an entire absence of any proof that disclosure would result in harassment of individuals for their associations or that disclosure is being sought by the statute for that purpose.

Substantially identical federal and state statutes have been upheld by the Courts in decisions demonstrating as above the lack of merit in the criticisms of the statute.

While the District Court erroneously ruled that the New York statute was invalid, and thus the merits are necessarily before this Court at this time, the case also raises the issue of whether any of these statutes may be challenged by any citizen simply because he is a citizen, which appears to be the only basis upon which the District Court entertained the suit. We contend that the District Court improperly held that the case presents a justiciable controversy within the meaning of Article III of the Constitution and the decisions of this Court. Mr. Multer, the only target of appellee's antagonism is now a Justice of the New York State Supreme Court and the election with respect to which the literature was distributed has long since passed. The Court was bound to consider the case in the final shape it had taken and if so considered the controversy had become moot. Appellee's bare assertion that he intends to distribute "similar anonymous leaflets in the future" is so unspecific as to provide no basis for jurisdiction and the mere fact that a First Amendment claim is advanced cannot substitute for the absence of allegations of fact.

The absence of judicial fitness of the controversy was not affected by the District's Court automatic grant of the injunction, the gravamen of the complaint. It was improper

to grant injunctive relief in the instant case without any proof and finding of any necessity to protect appellee's rights. Apart from this, this Court has long held that, even where a statute unconstitutionally infringing First Amendment rights is struck down, injunctive relief may not be granted without a showing of irreparable injury by undue harassment or other bad faith acts of the public officials involved.

POINT I

The statute enacted pursuant to the state's power to regulate the conduct of elections is a narrowly limited disclosure statute serving a necessary legitimate state purpose and does not constitute a restraint on freedom of expression. The First Amendment is aided rather than impeded by compliance with the statute.

New York's Election Law § 457, like the cognate federal statute (18 U.S.C. § 612), upheld in *United States* v. *Scott,* 195 F. Supp. 440 (D. No. Dak. 1961), and similar statutes of other states upheld in *Commonwealth* v. *Evans,* 156 Pa. Super. 321, 40 A. 2d 137; *Chronicle & Gazette Publishing Co., Inc.* v. *Attorney General,* —— N. H. ——, 48 A. 2d 478; *Canon* v. *Justice Court,* 39 Cal. Reptr. 228, 393 P. 2d 428 and *State* v. *Freeman,* 143 Kans. 315, 55 P. 2d 362, in no way regulates the content of speech. Such statutes have a long history of judicial and public acceptance.

The New York statute simply requires identity of the printer and sponsor to be stated thereon in the case of the distribution of campaign literature and there is no substantial basis to criticize this simple requirement as a restraint on freedom of expression. The District Court opinion labored to impute such a restraint despite the entire absence of any proof. Instead it appears to demonstrate in reality the verity of the position we have maintained in this litigation. In any event, even if *arguendo* some restraint were imputed, there is no occasion to balloon such

restraint into an unconstitutional invasion of the First Amendment.

A. New York Election Law § 457 promotes the purposes of the First Amendment and the duty of the State to protect the electoral process.

The statutes of New York and other states satisfy in every way the standards set out by this Court in its opinions: (a) legitimate state purpose and need (*Schneider* v. *State,* 308 U. S. 147, 161; *United States* v. *O'Brien,* 391 U. S. 367; *Pickering* v. *Board of Education,* 391 U. S. 563; *Konigsberg* v. *California,* 366 U. S. 36, 50-51); (b) substantial connection between the breadth of a disclosure demanded and the state's purpose (*Sherbert* v. *Verner,* 374 U. S. 398; *Shelton* v. *Tucker,* 364 U. S. 479, 489), and, finally, a corollary, (c) whether or not the statute involves an unnecessary restraint and whether disclosure might unduly prejudice those of whom it was required (*DeGregory* v. *Attorney General,* 383 U. S. 825, 828-29; *NAACP* v. *Alabama,* 357 U. S. 449).*

In applying these factors, this Court has consistently upheld limited disclosure statutes serving a strong governmental interest. *United States* v. *Harriss,* 347 U. S. 612; *Poulos* v. *New Hampshire,* 345 U. S. 395; *American Communications Association* v. *Douds,* 339 U. S. 382; *Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288.

New York Election Law § 457 is narrowly limited in its application to anonymous campaign literature. It is not directed at all literature printed any time under any circumstances. *Talley* v. *California,* 362 U. S. 60; *Jamison* v. *Texas,* 318 U. S. 413; *Lovell* v. *Griffin,* 303 U. S. 444. It does not restrict the circulation of anonymous literature

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* To the extent that other theories have been advanced for the weighing of First Amendment claims, Election Law, Section 457 satisfies the requirements of those tests as well. See *e.g.,* EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (N. Y. 1966), pp. 104-105 and "The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil," 70 Yale L. J. 1084 (1961).

dealing with ideas or even with current issues. See *Canon* v. *Justice Court, supra,* 393 P. 2d at 431. It is limited solely to literature respecting candidates and propositions on the ballot. It requires only that the printer and author or sponsor be identified on literature circulated in quantity to influence the electorate in their choice.

The limited nature of the statute does no more than is required to promote the important and legitimate state purposes of insuring the purity of the electoral process (*Burroughs and Cannon* v. *United States,* 290 U. S. 534) and promoting the intelligent use of the ballot. *Katzenbach* v. *Morgan,* 384 U. S. 641; *Lassiter* v. *Northhampton County Board of Elections,* 360 U. S. 45. This dual purpose requires that the statute not concern itself with the content of the anonymous matter and reflects the finding that anonymity itself in an election context is inimical to the voting process. The statute is thus not overbroad. *Cf. Talley* v. *California, supra; Sherbert* v. *Verner, supra; Shelton* v. *Tucker, supra.* Indeed, the overriding urgency of the information sought by § 457 and similar statutes is substantially increased by the recent decisions of this Court emphasizing the importance of the citizen's right to vote. See, *e.g., Baker* v. *Carr,* 369 U. S. 186; *Harper* v. *Virginia State Board of Elections,* 383 U. S. 663; *South Carolina* v. *Katzenbach,* 383 U. S. 301; *Carrington* v. *Rash,* 380 U. S. 89; *Katzenbach* v. *Morgan, supra; Mills* v. *Alabama,* 384 U. S. 214.

As the California Court said in *Canon* v. *Justice Court, supra,* at 431:

> "It is clear that the integrity of elections, essential to the very preservation of a free society, is a matter 'in which the State may have a compelling regulatory concern.' "*

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* Appellant does not contend that the statute's reach is *limited* to scurrilous or libelous literature. The statute by its terms, does not promulgate any standard other than anonymity. It applies to all campaign literature and anonymity is its only target. It is not its purpose to prevent any kind of utterance.

The statute protects the integrity of the electoral process first by facilitating the enforcement of various anti-corruption provisions in the Election Law. These include, for example, New York Election Law §§ 320-328 with respect to requirements for filing reports on campaign receipts, expenditures and contributions, § 447 respecting political assessments, § 454 respecting contributions from judicial candidates and § 460 respecting campaign contributions from corporations. To the extent that these sections might be circumvented by the expenditure of funds on anonymous literature, § 457 operates to prevent such a possibility. In this respect it is very similar to the federal provision, 18 U.S.C. § 612, which also was enacted to enforce other provisions of the Federal Corrupt Practices Act. 2 U.S.C. §§ 241-256. See S. Rep. No. 1390, 78th Cong., 2nd Sess., 2 (1944); Letter from Francis Biddle, Attorney General to Chairman, Senate Judiciary Committee (April 7, 1944). § 612 was upheld in the *Scott* case, *supra* (195 F. Supp. 440).

The District Court rejected this concern as a reasonable basis for the statute simply by saying that the passage of anti-corruption provisions could not be read as intending to limit the First Amendment. This *a priori* statement merely substitutes a conclusion for analysis and neither obviates the fact that such legislation was required nor assesses the impact on First Amendment considerations of such a statute.

A still more important interest served is the right of the public to know the identity of those urging a certain course with respect to an election in order to be able to evaluate material in the light of its sources. This aspect of the statute not only does not violate the purpose of the First Amendment but in fact promotes it. It is the same consideration behind the requirement of identification of those responsible for television and radio campaign material written into the Federal Communication Act (47 U.S.C. § 317(a); 47 C.F.R. § 73.654(f), (g)).

The "core value" of free speech is "the public interest in having free and unhindered debate on matters of public importance". *Pickering* v. *Board of Education, supra,* at 573. The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . ." *Associated Press* v. *United States,* 326 U. S. 1, 20. That legislation encouraging the dissemination of information promotes the aim of the First Amendment was stated by Mr. Justice Black in *Vierick* v. *United States,* 318 U. S. 236, 249 (dissenting opinion):

> "[It is a] fundamental constitutional principle that our people *adequately informed,* may be trusted to distinguish between the true and the false. . . ." (Emphasis supplied.)

The withholding of the source of information is certainly inimical to its broadest possible dissemination. Indeed, anonymity and the right of the people to know have been described as antagonistic values. "The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil," 70 Yale L. J. 1084 (1961). In the context of this case, however, disclosure is the relevant value. Indeed, in the instant case, no evidence was adduced that the statute restrains freedom of expression at all. Certainly, it does not do so on its face. It does not attempt to prescribe in any manner the content of speech. See *United States* v. *O'Brien, supra.* Nor does it require registration. *Cf. Thomas* v. *Collins,* 323 U. S. 516; *Cantwell* v. *Connecticut,* 310 U. S. 296.

The requirement of disclosure of information as a protection for the public is a well recognized legislative tool. The most sweeping disclosure requirements are found in the commercial context where virtually no product can be marketed without disclosing the manufacturer of the product and its contents and where securities cannot be sold without the most detailed information being provided. See *e.g.,* 15 U.S.C. §§ 46; 52-55; 68a-c; 69a-c; 70a-c; 77aa, 77g, 77j,

77*lll*, 77xxx, 781, 78m, 78o, 78q, 78r, 79f, 79g, 79o, 80a (8, 24, 25, 29, 32), 80b (3, 4, 7), 21 U.S.C. *passim*. See also "Freedom of Expression in a Commercial Context" 78 Harv. L. Rev. 1191, 1206-1207 (1965). This court has approved the disclosure requirements involved in the federal regulation of lobbying; 2 U.S.C. §§ 261-70. *United States* v. *Harriss*, 347 U. S. 612; the requirements of the Federal Corrupt Practices Act; 2 U.S.C. §§ 241-45; *Burroughs and Cannon* v. *United States*, 290 U. S. 534; and the disclosure required for the second class mailing privilege; 39 U.S.C. § 4369; *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288. Indeed, in *dicta*, this Court has approved the disclosure requirements of 18 U.S.C. § 612, which is similar to the statute in issue here. *Communist Party of the United States* v. *Subversive Activities Control Board*, 367 U. S. 1, 97. Surely the right of the public to know who is urging it to buy a product is no more important than its right to know who is urging it to elect a candidate.

The right of the public to know the sources of information is especially compelling in the modern era of mass communications:

> "As the marketplace changed from quill and parchment to printing press, camera and vacuum tube, the testing of truth increasingly required disclosure of the writer and of the source of financial support of the media of communication. The historic anonymity of the author is not to be analogized with the anonymity of dissemination of ideas in the vast quantities presently possible. Perhaps in more leisurly times the theory that ideas might be evaluated by themselves was a practicable one. In these hectic days when the facts upon which action must be based are numerous, and in many cases, understandable only by experts, the busy citizen has neither the time nor the faculties to analyze each idea presented to him and must, therefore, depend upon the status and reputation of those

who espouse it". Ernest and Katz "Speech: Public and Private", 53 Col. L. Rev. 620, 623 (1953).

B. There is a compelling need for the statute in an election context.

The importance of being able to identify the source of material is particularly urgent in an election context. Unlike a general and continuing debate on issues, an election requires the taking of a position with respect to questions of grave importance in a severely limited period of time. Cf. 70 Yale L. J., *supra,* at 1115, n. 194. In a situation where action is required, the public is entitled to know all of the relevant factors, including who supports and who opposes a particular candidate, before it can be requested to choose among them. This is the rationale of the Federal Regulation of Lobbying Act and is applicable equally to the election process. As this Court said in *United States* v. *Harriss, supra,* at 625:

> "Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressure to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depend to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. . . .
>
> Toward that end, Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose."

See also *Canon* v. *Justice Court, supra,* 393 P. 2d at 431; *United States* v. *Scott, supra; President's Committee on Civil Rights. To Secure These Rights,* 51-53 (1947)

maintaining that the volume and skill of modern propaganda make identification of the source of an argument essential to its evaluation. The purpose of identification in no way depends upon the nature of the material printed since the right to know in an election situation embraces the right to know who is speaking in favor of as well as who is opposing a candidate, and who is campaigning with ideas as well as with invective. See also *Lewis* v. *Morgan Publishing Co., supra* at 312.

Appellee's assertion that the source of a statement is not necessary to an evaluation of its truth, is, we are sure, not to be recorded as an Euclidean assertion. Furthermore, it overlooks the fact that campaign literature often deals not in statements of truth or falsity, but in emotional appeals which contain not facts and not ideas but personal factors which may create as strong an impression as a statement relating to the issues in the campaign.

The almost overwhelming complexity of the problem of assessing campaign material in modern times has most recently been evidenced in the promulgation of a "truth in advertising code" aimed at the political scene. The code, promulgated by the American Advertising Federation contains eight points which include not using quotations out of context, visual tricks to make the opponent look unattractive and appeal to prejudice. It also bans disparagement and name calling and guilt by association techniques. New York Times, Tuesday, February 6, 1968, page 67, col. 3. This code highlights the capacity for distortion which exists in a campaign context and is further evidence of the need for whateyer aid knowledge of the source of such campaign material can afford.

Moreover, identification of the source of this material is necessary for the public to be able to assess whether or not that source is so potent or important a figure or committee that it wishes to retaliate at the polls. Then, too, of course, the faceless adversary in an election campaign,

as in a courtroom, cannot be subjected to public questioning with respect to his position. As Chief Justice WARREN noted in *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 164 (concurring opinion):

> "[P]ublic opinion may be the only instrument by which society can attempt to influence . . . [the] conduct [of public officials]."

As the Court of Appeals for the District of Columbia has recognized, that opinion must be informed:

> " 'The public plainly has a vital interest not only in the calibre of candidates for political office, but in the nature of two groups of factions supporting the candidates, and the quality of candidates' spokesmen and backers are appropriate condemnations to be taken into account.' *Thompson* v. *Evening Star Newspaper Co.*, 394 F. 2d 775, 776 (D. C. Cir. 1968)."

Not only does publication of anonymous literature with respect to a campaign pressure the public to take sides without providing for the information as to the source of the pressure, but it does so within a period of time which makes it difficult, if not impossible, to ascertain the source before the choice must be made. This is an impermissible imposition both on the public and on the candidates.

This Court has long recognized that time is of the essence in an election campaign. *Mills* v. *Alabama*, 384 U. S. 214, 220. In that case the Court recognized that a law which made it a crime in effect to answer "last minute" charges on Election Day was unconstitutional because that was "the only time they can be effectively answered. Because the law prevents any adequate reply to these charges, it is wholly ineffective in protecting the electorate 'from confusive last-minute charges and counter charges.' " See also *Anderson* v. *Martin*, 375 U. S. 399; *American Communications Association* v. *Douds*, *supra* at 406. The question of identification *after* the election is completely ir-

relevant to the determination which the public must make with respect to the election and to the answers which the candidate must make with respect to any charges, innuendoes or emotional appeals.

Nor is the statutory refusal to sanction anonymous campaign literature purely hypothetical or academic. As we have said, the New York statute, like the federal statute and the statutes of 36 sister States* is rooted in experience. New York Election Law, Section 457 was enacted in 1962 as an amendment to New York Penal Law, Section 781-b. The original Section 781-b dealt only with printing anony-

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*Ala. Code tit. 17, § 282 (1940); Alaska Stat. § 15.55.030 (1962); Ark. Stat. § 3-1412 (1947 Ann.); Cal. Elections Code § 12047-49 (1965); Colo. Rev. Stat. § 49-21-50 (1963 Ann.); Fla. Stat. Ann. § 104.37 (Supp. 1966); Idaho Code Ann. § 34-104 (1953); Ill. Ann. Stat. ch. 47; §§ 26-1.3 (1963); Iowa Code tit. 35, § 738.22 (1966); Kan. Stat. Ann. § 25-1714 (1913); Ky. Rev. Stat. §§ 123.130 (Supp. 1966); La. Rev. Stat. § 18: 1531 (1950); Me. Rev. Stat. Ann. tit. 21, § 1575 (1964); Md. Code Art. 33, § 221 (1957); Mass. Ann. Laws ch. 56 §§ 39, 41 (1952); Mich. Stat. Ann. § 6.1914; Minn. Stat. § 211.08 (Supp. 1963); Mo. Rev. Stat. tit. 9, § 129.300 (1939); Mont. Rev. Codes § 94-147S (1947); Neb. Rev. Stat. § 32-1131-33 (Supp. 1965); N. H. Rev. Stat. tit. IV, § 70.14 (Supp. 1965); N. J. Stat. Ann. §§ 19:34-38.1-4 (1963); N. D. Century Code § 16-20-17.1 (1959); Ohio Rev. Code § 3599.09 (Supp. 1966); Ore. Rev. Stat. tit. 23, chap. 268, § 260.360 (1955); Pa. Stat. Ann. tit. 25, § 3546 (1933); R. I. Election Law § 17-23-2 (1923); S. D. Code 1939 § 16.9930 (Supp. 1960); Tenn. Code § 2-2238 (1955); Tex. Election Code Art. 14.10 (1951); Utah Code § 20-14-24 (1953); Vt. Stat. Ann. tit. 17, chap. 35, § 2022 (1963); Va. Code 1950 § 24-456; Wash. R.C.W.A. § 29, 85.270 (1965); W. Va. Code 1961, chap. 3, § 218(6) (a-b) (Supp. 1965); Wis. Stat. Ann., tit. II, chap. 12, § 12.16 (1911). Appellee sees no significance in the fact that so many states, as well as the federal government, have had substantially similar statutes for many years without successful challenge. We submit that this view of appellee is untenable. The uninterrupted operation of these statutes without provoking any discussion or any showing of First Amendment deterrent effect is a factor to be weighed by the Court here in appraising the constitutional challenge. Furthermorre, the legislative history of such statutes, both federal and state, *infra*, demonstrates their limited purpose, a consideration the majority opinion stated was absent in *Talley* (362 U. S. at 64).

mous campaign literature and was the result of uncontrolled expenditure, anonymous appeals to ethnic background and other personal factors in the 1940 Presidential election campaign.

The first New York statute was passed virtually simultaneously with the federal statute and relied in large measure on federal documentation available respecting the necessity for such legislation. In 1941 Maurice M. Milligan, a Special Assistant to United States Attorney General Robert H. Jackson, prepared a report to the Attorney General respecting alleged violations of the federal election laws during the 1940 campaign. His report contained specific recommendations for rectifying omissions in the Hatch and Corrupt Practices Act as revealed by testimony before a federal Grand Jury sitting in the District of Columbia to investigate the excessive use of money in the 1940 election. That report which is a part of the legislative history of the New York statute, said that the Grand Jury had found that an excessive sum of money had been used during the 1940 campaign and that while, under the law as it then stood, no indictments could be returned, further curbs were necessary. Among the recommendations of the Committee were those requiring reporting of expenditures and:

> "[A]mending the Corrupt Practices Act to prohibit circulation through the United States mails of any and all literature, the purpose of which is to influence the election of candidates for Federal office, or Presidential and Vice-Presidential electors, or the enactment or defeat of measures before the Congress of the United States, unless it is signed by the person, or persons or committee or organization responsibile for its circulation, together with their addresses. We also suggest that all such printed matter contain the names and addresses of the person, persons, committee or organization responsible for its printing."

Almost simultaneously, Senator Guy M. Gillette of Iowa in the Senate, on February 13, 1941, supported a proposed bill for the identification of those responsible for the circulation of certain types of literature through the mails. As the Senator said:

> "The task of exposing the sources . . . is accepted as a responsibility of government, while the task of answering such propaganda is left largely to private initiative." Congressional Record—Appendix (March 6, 1941, pp. A1111-1112).

The federal statute (18 U.S.C. § 612) enacted as a result embraced anonymous publication or distribution of "any card, pamphlet, circular, poster, dodger, advertisement, writing, or other statement relating to or concerning any person who has publicly declared his intention to seek the office of President, or Vice President of the United States, or Senator or Representative in, or Delegate to or Resident Commissioner to Congress, in a primary, general or special election, or convention of a political party . . ." This was the statute upheld in 1961 in *United States* v. *Scott, supra* (at 443) where the District Court in a criminal prosecution distinguished *Talley* v. *California, supra,* stating that it was passed:

> "So that the electorate would be informed and make its own appraisal of the reason or reasons why a particular candidate was being supported or opposed by an individual or groups. Is there anything sinister in requiring disclosure of identity to the end that voters may use their ballots intelligently? Is it so perfectly apparent what havoc could be wrought by anonymous publications concerning candidates enumerated under § 612."

The original New York statute, which recognized these two sources, was enacted in 1941. It did not go as far as the federal statute. It called for the identification only of

the printer of the anonymous campaign material. Nevertheless, this basic New York statute was supplementary to and implementative of the Congressional legislation to insure the primary *sine qua non* of the operation of a democracy—the ballot. It is significant that in the present case a Congressional election was involved [Multer] and that, if the distribution had been or is subsequently made by mail, that there would have been a violation of the federal statute.

The 1962 amendment to the statute broadened the coverage to include the distributor as well as the printer and, thus, became more identical with the federal statute. It was so enacted following an investigation into the charges and counter charges hurled during the 1961 Mayoralty Democratic Primary campaign in New York City. The two principal candidates for the Democratic nomination for Mayor, each charged that anonymous literature was being circulated by his opponent.

An investigation was conducted by a Special Assistant Attorney General who was counsel to the New York Fair Campaign Practices Committee and attorneys of standing independently selected, who served without compensation.* The investigation was conducted with the cooperation of the National Fair Campaign Practices Committee, Inc.** The investigation committee submitted an interim and a final report. It was established that the Wagner charge that the regular Democratic organizations in the Bronx and Brooklyn circulated anonymous campaign literature was true and that the distribution was dictated by "politics".

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* The interim and final reports of the investigating committee were submitted to this Court in the first *Zwickler* and to the District Court following remand as appendices to the briefs. They are once more annexed as appendices to appellant's brief.

** The Attorney General accepted the recommendation of the Committee in the staff appointments and allowed such counsel uninterrupted independence in their inquiry and in the reports subsequently filed by them.

An examination of the records of the Club circulating the literature disclosed no evidence of expenditures for the printing of such literature. Moreover, a major portion of the 1961 Primary campaign receipts of the Club in question were not recorded and neither the Treasurer nor any person associated with the political committee for the District had filed a financial statement with the Secretary of State as required by Section 324 of the Election Law, nor had a statement been filed identifying the Treasurer of the Committee as required by Section 325 of the Election Law and most important, Section 327 of the Election Law requiring the Treasurer of a political committee to maintain a detailed account of campaign receipts and expenditures including a receipted bill stating the particulars of each expense had not been complied with. The counter charge that Wagner workers had distributed an anti-Semitic leaflet was not established. Indeed, the source of the anti-Semitic literature was never established. Expert printers informed the investigators that the anonymous leaflets had been printed by an unskilled and inexperienced person and Wagner headquarters felt that the circular was an "opposition plant."

The Committee recommended the removal of the "cloak of anonymity", by the amendment of the statute so as to require the campaign literature to bear the name and address of the printer and the person and organization ordering the material. The recommendations of the Commitee were, for the most part, incorporated in the revised legislation.

The new amendment was supported not only by the National Fair Campaign Practices Committee, but also by the Association of the Bar of the City of New York, and the Citizens' Union. Its desirability was further emphasized by the non-partisan support of the Democratic, Republican and Liberal parties, the only major political parties at that time.

The exact impact of anonymous literature on opinion cannot, of course, be precisely assessed. However, it is a well-known phenomenon that the printed word carries an impact of its own which tends to incline the recipient of literature in the suggested direction, even if the literature is anonymous. See WAPLES, BERELSON AND BRADSHAW, WHAT READING DOES TO PEOPLE: A SUMMARY OF EVIDENCE ON THE SOCIAL EFFECTS OF READING AND A STATEMENT OF PROBLEMS FOR RESEARCH (1940), pp. 108-109. This fact has even been demonstrated in the area of campaign literature where it was found that an anonymous leaflet on a controversial subject tended to change the opinion of the recipient of that leaflet in the direction of the position it advocated. Dietsch and Gurnee "The Cumulative Effect of a Series of Campaign Leaflets", 32 Journal of Applied Psychology, 189, 194 (1948). A written communication will cause a change in opinion even if the source or author is one of "low-credibility". Low credibility may result from an author with an antagonistic view or from anonymity. A person who has read the argument tends to dissociate the contents from the communicator. While he forgets the source, he remembers the text and his attitude is change by it as long as he is not reminded of the source. HOVLAND, JANIS AND KELLY, COMMUNICATION AND PERSUASION: PSYCHOLOGICAL STUDIES OF OPINION CHANGE (1953), pp. 280-81. In an election context, of course, where the source is not identified, no one can be reminded of it.

Despite its lengthy opinion, the District Court made no attempt to consider the right of the public to know and no attempt to consider the situation which exists during an election campaign. The Court dismissed those cases in which disclosure has been upheld as "special situations" without once discussing why the instant election situation is not as special as the others. In fact, however, as we have demonstrated the statute is reasonably related to legitimate state concerns and is not too broad to effectuate those concerns. It is thus wholly unlike the cases in which the State

was denied disclosure either for want of a substantial connection between the material sought and a legitimate state purpose or because the statute was not limited to the end sought to be achieved. *Talley* v. *California, supra; Shelton* v. *Tucker, supra; Sherbert* v. *Verner, supra; Gibson* v. *Florida Investigation Committee,* 372 U. S. 539; *N.A.A.C.P.* v. *Alabama, supra; Bates* v. *City of Little Rock,* 361 U. S. 516. The statute struck down by the New York Courts themselves in *People* v. *Mishkin,* 17 A. D. 2d 243 (1st Dept. 1962), *aff'd.* 15 N. Y. 2d 671 (1964), suffered a similar infirmity.

C. No realistic fear of reprisal is justified by § 457.

The District Court relied heavily on a self-created presumption of reprisal if anonymous distribution were not allowed although appellee, significally, did not. No facts were stated to justify such a presumption. Indeed, the national and local atmosphere and the kind of distribution made and disclosure required herein create, if anything, a presumption that fear of reprisal is unrealistic. The only specific reference to reprisal by the lower Court was to the fear of large damage awards (A. 41, 43) an allegation not made in the complaint. However, as the opinion, simultaneously recognized, this Court has taken great strides in extending the First Amendment directly. See, *e.g., Time, Inc.* v. *Hill,* 385 U. S. 374; *New York Times* v. *Sullivan,* 376 U. S. 254; *Associated Press* v. *Walker,* 379 U. S. 47. These cases now effectively insulate political criticism from threat of libel and invasion of privacy suits except in the most outrageous and egregious cases. New York courts have liberally applied the *New York Times* case. *Gilberg* v. *Goffi,* 21 A. D. 2d 517, 251 N.Y.S. 2d 823 (2d Dept, aff'd without opinion 15 N. Y. 2d 1023; *Jacobowitz* v. *Posner,* 28 A. D. 2d 706, 282 N.Y.S. 2d 670 (2d Dept.) aff'd without opinion, 21 N. Y. 2d 936. In *Gilberg,* the Court said:

> "Within the periphery of the new body of case law, we hold, on a balancing of interests, that democratic

> government is best served when citizens, and especially public officials and those who aspire to public office, may freely speak out on questions of public concern even if thereby some individual be wrongful calumnated."

The District Court expressed some amazement that the New York criminal libel laws have been repealed and that therefore a clergyman can falsely be accused of adultery whereas a public official cannot be anonymously confronted with the truth (A. 41).* This merely serves to highlight the limited nature of § 457 and the fact that reprisal for statements is extremely limited, if it exists at all, with respect to public officials. Actually, the circulation of dissenting opinions upon highly emotional issues in this country in non-anonymous form is now a common-place occurrence and arises in virtually daily fashion in our newspapers, magazines and other mass communications media. The fear of reprisal does not deter such publication, nor is there any reason why it should. What the Supreme Court of California said with respect to the California statute in *Canon* v. *Justice Court, supra* at 431, is applicable to New York:

> "[T]here is nothing to indicate that the disclosure requirement, under the circumstances of present-day

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* In fact, criminal libel has rarely been prosecuted in New York before the revision of New York's Penal Law which eliminated libel as a penal offense, as the District Court was informed. Furthermore, since *Garrison* v. *Louisiana*, 379 U. S. 64, 13 L. ed. 2d 125, 135 (1964), the feasibility of such prosecution was sapped. But in a broader sense, the comment of the District Court appears to evidence its lack of appreciation of the public importance of election contests as contrasted, for instance, with the illustration of the minister given by that Court. In these days of tremendous public turmoil, it is hard to understand the District Court's equation of the minister with the candidate for such important office as the Mayor of the City of New York or the U. S. Representative [Multer] referred to in appellee's campaign literature.

California politics, would in fact substantially inhibit expression, even in the limited area to which the statute is applicable . . ."

Relying on *Talley* v. *California, supra,* the District Court and appellee sought comfort in the pre-revolutionary history of anonymous literature in England and in this country. However, as the *Talley* opinion makes clear,* anonymous literature is attributable to the fear of reprisal and not to any finding that it is good in itself. Anonymous literature flourished in an atmosphere of repression which it simultaneously served to destroy. This is apparent from the fact that out of the repression of speech in England and in this country grew not only the First Amendment but the Fifth Amendment privilege against self-incrimination. See CHAFFEE, THE BLESSINGS OF LIBERTY (1956), pp. 179-209. The development of the privilege against self-incrimination is one more aspect of the lack of a continuing need to enforce the right to anonymity in an election context. In fact, none of the anonymous literature relied on by appellee would have fallen with the prohibition of § 457. See generally BLEYER, MAIN CURRENTS IN THE HISTORY OF AMERICAN JOURNALISM (1927), p. 102. The letters of Junius appeared in the London Public Advertiser from 1769 to 1772. The publisher was prosecuted for seditious libel based on one of the letters which was addressed to the King and which protested the policies of the Government. The jury acquitted. BLEYER, *supra* at 23-27. These letters by their appearance in the newspaper would not fall within Section 457 if published in this country. Moreover, since they did not relate to any election campaign they would not have fallen within the statute even if they were circulated as

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* The District Court opinion in the *Scott* case as we have noted, carefully distinguished *Talley* as did the California case of *Canon* v. *Justice Court, supra.* Neither the District Court in the instant case nor the appellee made any effort to challenge either of these decisions directly.

anonymous handbills. The letters of Cato appeared from 1720 to 1723 in British newspapers and were reprinted in colonial newspapers. They concerned theories of liberty and representative government. Once more not only did these letters appear in newspapers, but they were unrelated to any election campaign. BLEYER, *supra,* at 23, 55, 64. The trials of James Franklin and John Peter Zenger would also not have fallen within the provisions of Election Law, Section 457. BLEYER, *supra* at 58-63. Appellee's belated discovery that GULLIVER'S TRAVELS was first published anonymously does not alter the situation. In the first place, the book had a known publisher and in the second place, it was not campaign literature.

The specific leaflet circulated by appellee is an excellent example of speech which never had any need to be anonymous and the anonymity served no useful purpose for the appellee. Essentially, his leaflet was directed at attacking the ethnic loyalty of MR. MULTER in a district in Brooklyn in which the betrayal of such loyalty would not be well received. On the other hand, such information, if accurate, would be well received by the populace of that district.* In this connection, the telling fact is that appellee had no hesitation in orally revealing his identity to the police before he distributed the circular and when he provoked the citizen's arrest. Thus, it is frivolous to raise the spectre of deterrent effect here in the requirement for disclosure.

Actually, the circulation of dissenting opinions upon highly emotional issues in this country in non-anonymous form is now a common-place occurrence and arises in virtually daily fashion in our newspapers, magazines and other mass communication media. The fear of reprisal does not apparently deter such publication, nor, is there

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* It is fanciful to picture one's self as taking any risks in distributing pro-Israeli circulars in this district having a large Jewish population, as shown by the 1960 census. This serves to add emphasis to the wholly unjusticiable nature of the controversy.

any reason why it should. The predilection for anonymity in pre-First Amendment days has given way to the contrary predilection for identification without any fear of reprisal.

The reliance below on *Bates* v. *City of Little Rock, supra* and *NAACP* v. *Alabama, supra* was entirely misplaced. Those cases presented concrete proof of the existence of a hostile atmosphere and the real threat of reprisal against members of the organization under attack. Indeed the very scope of disclosure required in those cases, so much broader than any valid state interest, and so much broader than disclosure required by § 457, is highly indicative of the fact that disclosure was required not for the purposes set forth but for reprisal itself. While § 457 requires the name of only the printer and the person or committee who authorized the printing and distribution, the statutes in the NAACP cases required entire membership lists to be placed on public file. In light of the local atmosphere, it would have been tragic for this information to be spread out for public scrutiny. Indeed those cases involving the associational right of privacy typical involve the requirement of disclosure either of past and therefore stale associations (*DeGregory* v. *Attorney General of New Hampshire*, 383 U. S. 825) or of essentially passive members of an organization with no official capacity to direct policy or activities. See also *Lamont* v. *Postmaster General*, 381 U. S. 301. By contrast, the instant case presents the requirement of disclosure in a highly active capacity in a limited context and with reference only to current activities.

There is no inherent virtue in anonymity. It is a withholding of information from the public which, if disclosed, might have a considerable bearing on the evaluation of its content. At best, anonymity is an inadequate substitute for open discussion in a political atmosphere more receptive to such discussion. Its function is to permit the promulgation of matter which under certain circumstances would place the promulgator in real fear of reprisal. As

such, it does not support, but rather is inimical to the basic purposes of the First Amendment. In *Canon* v. *Justice Court, supra* at 432, the California Court observed:

> "The chief harm is that suffered by all the people when, as a result of the public having been misinformed and misled, the election is not the expression of the true public will."

POINT II

The District Court erred in concluding that appellee as a citizen was entitled to declaratory judgment as to the validity of the statute when there were no facts at that time to support any claim of justiciable controversy. The expansive view of the District Court requires review by this Court even though the merits are also under review.

In remanding the instant case, this Court directed the District Court to consider whether or not the complaint established a controversy within the meaning of the Declaratory Judgment Act (28 U.S.C. §§ 2201, 2202) and Article III of the Constitution. *Zwickler* v. *Koota,* 389 U. S. 241, 244.

The standard by which the existence of a case or controversy is to be determined, was specifically stated by the Court:

> "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *Maryland Cas. Co.* v. *Pacific Coal and Oil Co.,* 312 U. S. 270, 273." *Zwickler* v. *Koota, supra* at 244 n. 3.

The burden was on appellee to "establish the elements governing the issuance of a declaratory judgment". *Id.* at 252, n. 15.

Certainly, the District Court to the contrary notwithstanding (A. 32), the mere existence of a penal statute should not, without more, create a case or controversy (*Poe* v. *Ullman*, 367 U. S. 497), even where a First Amendment claim is alleged. *United Public Workers of America* v. *Mitchell*, 330 U. S. 75.

Appellee has insisted that there was a case or controversy between the parties at the time he filed his complaint and that there is one now. We have maintained from the outset that there was no case or controversy when the complaint was filed but it is absolutely clear that there is none now. The amended complaint was filed on May 3, 1966. It alleged that appellee had previously been prosecuted, unsuccessfully, for violation of N. Y. Penal Law, § 781-b in that, some four days before the 1964 election, he had distributed a leaflet calling on the Representative Abraham Multer to explain why he had voted against cutting off aid to the United Arab Republic and had announced his preference of a "watered down" condemnation of religious bigotry over a denunciation of Soviet anti-Semitism. The evidence established that appellee had distributed one copy of this leaflet, in Mr. Multer's district.

Other than the specific reference to Congressman Multer, the complaint alleged that appellee:

> "desires and intends to distribute in the Borough of Brooklyn, County of Kings, New York . . . the anonymous leaflet herein described . . . and similar anonymous leaflets, all prepared by and at the instance of person other than the plaintiff. The said distribution is intended to be made at any time during the election campaign of 1966 and in subsequent election campaigns or in connection with any election of party officials,

nomination for public office and party position that may occur subsequent to said election campaign of 1966." (A. 9)

The election of 1966 is past. Mr. Multer, the only named target of appellee's antagonism, is a Justice of the New York State Supreme Court. *Zwickler* v. *Koota, supra,* at 252, n. 16. The possibility of Mr. Multer's running for office again, which appellee suggested below, is so remote and hypothetical as scarcely deserving discussion. The case has, in fact, become moot, a possibility noted by this Court on the remand. See, *e.g., Flast* v. *Cohen,* 392 U. S. 83; *Gray* v. *Board of Trustees,* 342 U. S. 517; *Brownlow* v. *Schwartz,* 261 U. S. 216.

The District Court gave no weight to the facts that the election of 1966 has passed and that Mr. Multer is no longer a Congressman. It accepted as establishing a controversy the claim that appellee intends at some unspecified time to distribute "similar anonymous leaflets" (A. 9). But that allegation by itself is utterly meaningless. The complaint does not state in what respect the leaflets will be similar. Certainly they would not be similar with respect to Justice Multer. The time at which these mysterious distributions will be made is alleged solely in terms of a parroting of the statute and, being all-inclusive, says nothing. The bare allegation of intent simply does not carry appellee's burden that he establish a case of "immediacy and reality". *Maryland Cas. Co.* v. *Pacific Coal & Oil Co.,* 312 U. S. at 273; *United Public Workers of America* v. *Mitchell,* 330 U. S. at 89. Moreover, the action was to be considered by the Court in the "final shape" it had taken on. See *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 240-241; *Public Service Comm'n of Utah* v. *Wycoff Co., Inc.,* 344 U. S. 237, 243-244.

With the accession of Mr. Multer to the bench and away from the campaign scene, the complaint reduces itself to an expression of appellee's distaste for the statute, if indeed, it was ever any more. The most serious charge ap-

pellee can bring against the statute has nothing to do with fear of exposure or reprisal. Instead he ingenuously states that he "intends to distribute said leaflet and similar leaflets anonymously because of his belief and claim that the statute . . . is unconstitutional" (A. 9). That, it is submitted, is a classic statement of a hypothetical, academic question. In short, appellee says, there exists a statute of which he disapproves. It proscribes activity which he feels compelled to undertake not because of any inherent need he has to perform the activity but only because he feels that it should not be proscribed. The statute was, for appellee, father to the deed. "[T]he remedy of declaratory decree, however, was never intended to be an instrument to be used by those merely curious or dubious as to the true state of the law no matter how meritorious they conceive their theory to be." *Fair* v. *Adams,* 233 F. Supp. 310, 312 (N. D. Fla. 1964).

While the previous unsuccessful prosecution of appellee may have colored his claim, it did not render it justiciable. That the arrest was provoked is obvious; that no prosecution has ever succeeded under the statute is a matter of record; that no subsequent prosecution or threat of prosecution is alleged to have been made by appellant against appellee *or anyone else* is undeniable. Certainly, it is not contended that the above factors are dispositive of the matter, but they are indicative of the atmosphere in which the prosecution took place and of the lengths to which appellee would have to go to make them take place again. When coupled with the fact that the only identified object of his antipathy is no longer available and with the further fact that, in 1967 appellee allowed publication of his name on a circular against Mr. Multer with respect to the judicial election that year, the controversy asserted by him is dissipated.*

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* The circular was referred to on the prior oral argument before this Court and was offered to the District Court which rejected it as immaterial (A. 52). It is submitted that this holding was erroneous.

Both appellee and the District Court seemed to regard it as a separate point that appellee alleged that he had been "chilled" in the exercise of his First Amendment rights. The forbidden "chill" is not a talisman whose existence may be substituted for allegations of fact. The word has no inherent value of its own entitling appellee to declaratory relief irrespective of the absence of concrete allegations. His contention that, but for the statute, he would distribute some unspecified literature at an uncertain time about an unnamed candidate is inadequate. His allegation that the statute is "overbroad" besides having no tenable basis (see *supra* Pt. I), does not entitle him to relief absent the necessary allegations with respect to his interest in the question.

Appellee failed to show that the statute will place any limitation on his future behavior and consequently under the decisions of this Court, he failed to meet the requirement of first showing that the statute he challenges is currently affecting his behavior. See *Dombrowski* v. *Pfister*, 380 U. S. 479; *Baggett* v. *Bullitt*, 377 U. S. 360; *NAACP* v. *Button*, 371 U. S. 415; *Smith* v. *California*, 361 U. S. 147.

The District Court and appellee erroneously placed great reliance on the decision of this Court in *Evers* v. *Dwyer*, 358 U. S. 202 apparently because *Evers* recognized that merely because a case is a "test" case it is not to be denied "case or controversy" status. Neither, however, should it be granted such status. The plaintiff in *Evers* sought to break the segregated bus system in Memphis. He got on a bus and was threatened with arrest. He undertook to challenge a pervasive practice, rigidly enforced at every level of state and local government, with respect to a daily activity. As the Court held:

> "A resident of a municipality who cannot use transportation facilities therein without being subjected by

statute to special disabilities necessarily has, we think, a *substantial immediate and real interest* in the validity of the statute which imposes the disability." (*Id.* at 204) (Emphasis supplied)

But this Court in *Evers* was careful to point out that "the federal courts will not grant declaratory relief in instances where the record does not disclose an 'actual controversy' " (358 U. S. at 203) and to endorse the same statement in *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 later also referred to in *Zwickler* v. *Koota, supra,* at 244, n. 3.

While the disposition by the District Court here under review passed on the merits adversely to the State and it is of the highest importance to the State's electorate that such decision upon the merits be reviewed and the state requirement protecting the electorate upheld (See Point I), nevertheless the expansive view of justiciable controversy expressed below by the District Court is so potent of misunderstanding that this Court should set forth its views as to whether there is, in fact, a right to declaratory judgment in the posture of the case.

POINT III

The granting of injunctive relief by the District Court was unwarranted and in direct contravention of prior decisions of this Court. There was an entire absence of any basis for the maintenance of the injunction against the local district attorney.

Without any discussion as to its necessity, the District Court granted injunctive relief apparently as a matter of course (A. 52). The Court seemed to regard an injunction as an automatic concomitant of declaratory relief. Not a single fact was established which would even tend to indicate the necessity for this extraordinary exercise of

power. The decision of the Court to grant an injunction under such circumstances directly contradicts a long line of decisions by this Court.

In its original decision in this case this Court was careful to distinguish between the standard for declaratory judgment and the standard for injunction and specifically reiterated its holding in *Douglas* v. *City of Jeanette,* 319 U. S. 157, in which the Court declined to issue an injunction even though it had the same day struck down the statute whose enforcement was sought to be enjoined (*Murdock* v. *Pennsylvania,* 319 U. S. 105). *Zwickler* v. *Koota,* 391 U. S. 241, 254-55. The Court had only recently reiterated this distinction in *Dombrowski* v. *Pfister,* 380 U. S. 479 and has subsequently reiterated it in *Cameron* v. *Johnson;* 390 U. S. 611.

In order to secure injunctive relief appellee was required to show that he was presently being barred from distribution so as to suffer irreparable damage and that the conduct of state officials was such that he was being subjected to harassment. *Dombrowski* v. *Pfister, supra; Watson* v. *Buck,* 313 U. S. 387; *Wells* v. *Hand,* 238 F. Supp. 779 (D. Ga. 1965), *aff'd* 382 U. S. 39. Indeed, far from showing the kind of official conduct present in *Dombrowski* v. *Pfister* and absent in *Cameron* v. *Johnson* there was no showing that the appellant would not comply with an order granting declaratory relief. In fact, the complaint acknowledges that the District Attorney is a "diligent and conscientious public officer" who would act in good faith* (A. 9). The allegation of a First Amendment claim does not alter the requirement for a showing of irreparable injury. All of the cases cited above involved such claims.

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* Mr. Koota is no longer the District Attorney of Kings County. Mr. Golden, the appellant in this case, will be acting District Attorney of Kings County until January 1, 1969. At that time he will be succeeded by Eugene J. Gold.

We can only assume that the District Court's action in the grant of the injunctive relief without assigning any reasons was dictated by a recognition of the fact that there was no proof, other than the existence of the statute, of any threat to the appellee. The only defendant was the District Attorney of one of the 62 counties of the state. Whatever the motivating force for this disposition by the District Court, there never was at the time of the commencement of the action and there was not at the time of such disposition any case for injunctive relief.

CONCLUSION

For the foregoing reasons the order of the District Court should be reversed and the complaint dismissed.

Dated: New York, New York, November 29, 1968.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellant

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

BRENDA SOLOFF
Assistant Attorney General
of Counsel

APPENDIX "A"

INTERIM REPORT

To: Honorable Louis J. Lefkowitz
Attorney General of the State of New York

From: John G. Bonomi
Special Assistant Attorney General
Counsel, New York Fair Campaign Practices Committee

Re: Printing and Distribution of Anonymous Campaign Literature in 1961 Mayoralty Primary

Introduction

This is an interim report of the Attorney General's investigation into the printing and distribution of anonymous "hate literature" during the 1961 primary campaign for Mayor in New York City.

The present inquiry was instituted at the request of the two Democratic primary candidates, New York State Comptroller Arthur Levitt, the "regular" organization candidates and Mayor Robert F. Wagner.

In the last days of the primary campaign a torrent of charges and counter-charges concerning the printing and distribution of anonymous "hate literature" emanated from the two opposing Democratic factions.

We have restricted our investigation to complaints concerning *anonymous* "hate literature", which may be violative of § 781-b of the Penal Law. This statute provides criminal penalties for the printing of any campaign literature which does not identify the printer or sponsoring organization. The full text of this statute is as follows:

"§ 781-b. *Printing or other reproduction of certain political literature.* No person shall print or reproduce

in quantity by any method any handbill, pamphlet, circular, post card, placard or letter for another, which contains any statement, notice, information, allegation or other material concerning any political party, candidate, committee, person, proposition or amendment to the State Constitution whether in favor of or against such political party, candidate, committee, person, proposition or amendment to the State Constitution, in connection with any election of public officers, candidates for nomination for public office, proposition or amendment to the state constitution without also printing or reproducing thereon legibly and in the English language the name and post-office address of the printer thereof or of the person and committee at whose instance or request such handbill, pamphlet, circular, post card, placard or letter is so printed or reproduced, and no person nor committee shall so print or reproduce for himself or itself any such handbill, pamphlet, cicular, post card, placard or letter without also so printing or reproducing his or its name and post-office address thereon. A violation of the provisions of this section shall constitute a misdemeanor.

The term 'printer' as used in this section means the principal who or which by independent contractual relationship is responsible directly to the person or committee, at whose instance or request a handbill, pamphlet, circular, postcard, placard or letter is printed or reproduced by such principal, and does not include a person working for or employed by such a principal."

Our interim report concerns two such complaints: (1) The Wagner charge that the regular Bronx Democratic organization circulated a packet of anonymous "hate literature" implying that the Mayor was a "Communist

Puppet"; and (2) the Levitt charge that Sanitation Department employees in Queens, distributed an anonymous "Anti-Semitic" leaflet directed against the candidacy of Comptroller Levitt.

After exhaustive investigation we have established that the regular Democratic organizations in the Bronx and Brooklyn did, in fact, distribute the anonymous packet implying Wagner was a "Communist Puppet".

We have found no evidence to support the Levitt complaint that an "Anti-Semitic" leaflet was distributed by Wagner workers or anyone else. Indeed, the Queens Democratic leader who purportedly brought this leaflet to the attention of Levitt headquarters has questioned its origin and authenticity.

Initiation of Investigation

On August 31, 1961, Comptroller Levitt, one of the two candidates in the Democratic mayoralty primary, issued a public statement which, in part, charged that New York Sanitation Department employees were making anti-semitic arguments and circulating anti-semitic leaflets in support of Mayor Wagner's candidacy. This public charge was supported by the release of the "Anti-Semitic" leaflet, purportedly being distributed. On September 1, the Comptroller sent a formal letter of complaint to the Attorney General requesting an investigation.

Mayor Wagner denied any knowledge of the charge and requested that the Fair Campaign Practices Committee, a national non-partisan organization, initiate an inquiry. On September 4, the Attorney General asked the Fair Campaign Practices Committee to nominate an attorney who would be appointed a Special Assistant Attorney General under § 69 of the Executive Law to conduct the requested investigation.

Two days later, on September 6, the Attorney General appointed John G. Bonomi, a Special Assistant Attorney

General pursuant to the recommendation of this Committee. The New York City Fair Campaign Practices Committee was organized on the same day, under the aegis of the national group. To assist in the probe Special Assistant Attorney General Bonomi nominated, the New York City Fair Campaign Practices Committee approved, and the Attorney General appointed the following Special Assistant Attorneys General: Manuel Guerreiro; Alexander Holtzman; Donald A. Hopper; Allan A. Pines; William Rand; Walter Wager; and Thomas Weaver. All are practicing attorneys and served on a part time basis, without compensation.

At the request of Special Assistant Attorney General Bonomi, the Superintendent of the New York State Police assigned two investigators to the staff for the conduct of field investigations.

Wagner Charge

On September 6, 1961, Mayor Wagner charged that the regular Bronx Democratic organization was circulating a packet of anonymous "hate literature" implying that he was a "Communist Puppet". This packet consisted of the following four pieces of literature which bore neither the identity of the printer nor the sponsoring organization:

(1) A poster featuring a cartoon in which Mayor Wagner is depicted as a puppet of ex-Senator Herbert Lehman, Mrs. Eleanor Roosevelt, and three labor leaders. A caption on the poster urges voters to "Stop" Lehman, Mrs. Roosevelt et al. and "their Puppet Wagner and all other Splinter Groups, A.D.A.'s and Left Wingers from taking over the Democratic Party";

(2) A poster with the caption "Lehman's Niece Bails Soviet Spy Soblen". The body of this poster consists of a copy of an article appearing in the August

29, 1961 issue of the New York Daily News concerning Dr. Robert Soblen, recently convicted of espionage for the Soviet Union. The portion of the article which notes that Lehman's niece furnished bail for Soblen is encircled;

(3) A copy of a photograph of Mayor Wagner with Mrs. Roosevelt which appeared in the August 22, 1961 issue of the New York Post; and

(4) An article in the January 17, 1953 issue of "The Tablet" lauding Comptroller Levitt's anti-communist activities.

The Mayor referred to this packet as "the most scurrilous kit of campaign literature in the history of American politics".

"What is more" the Mayor stated, "reports have reached us that these anonymous leaflets were masterminded by Boss DeSapio and carried out by Boss Buckley's machine in the Bronx. We know that envelopes similar to these were addressed by clubhouse members all last week to special Irish mailing lists. We have received reports that the leaflets were stuffed in Boss Buckley's own clubhouse under the direction of Philip Gilsten, the discredited former Deputy City Treasurer."

Investigation of Wagner Charge

In our investigation of the Wagner charge we interviewed about one hundred persons including Philip Gilsten, the Democratic leader in the 8th Assembly District in the Bronx and Executive Member of the North End Democratic Club, 416 East 189th Street, The Bronx; Benjamin Gluckow, Secretary to Congressman Charles Buckley and Secretary of the North End Democratic Club; New York City Councilman Thomas J. Cuite, the co-ordinator of the Levitt primary campaign in Brooklyn; Carmine

DeSapio, former Chairman of the New York County Democratic Committee; registered Democratic voters in the 3rd Assembly District of The Bronx; printers of campaign literature; and campaign consultants to the opposing groups in the Democratic primary.

The original complaint concerning the anonymous "Communist Puppet" kit was made by a family residing in the 3rd Assembly District in the Bronx. This family had received the anonymous kit by mail in an unmarked envelope.

Interviews in the field with registered Democratic voters in the complainant's neighborhood established that a number had received identical kits in unmarked envelopes.

On October 4 two Special Assistant Attorneys General, Donald A. Hopper and Allan A. Pines, interviewed Philip Gilsten at the executive offices of the North End Democratic Club, the so-called "[Congressman] Buckley clubhouse".

Gilsten readily admitted that the anonymous campaign packet implying that Wagner was a "Communist Puppet" was distributed in the Bronx under the auspices of the North End Democratic Club. He described the North End Club as a "drop" for a substantial portion of the Levitt campaign literature distributed in the Bronx. Gilsten further explained that all of the regular Democratic clubs in the Bronx used the North End's facilities for the "processing" of campaign material because of its spacious quarters and considerable experience in this activity.

Gilsten stated that workers from all of the regular Bronx Democratic clubs came to the North End Club to aid in the preparation of the anonymous "Communist Puppet" kit for distribution. He also reported that some of the anonymous kits were mailed directly from the North End Club while others were circulated by the regular Democratic clubs in their own areas.

Gilsten characterized the anonymous "Wagner Puppet" leaflet as "brilliant" in conception. He said the distribu-

tion of the anonymous kit was dictated by "politics" and commented "we were fighting for our political life".

Benjamin Gluckow, Secretary to Congressman Charles Buckley and an officer of the North End Club, confirmed Gilsten's statements concerning the distribution of the "Communist Puppet" kit. Upon interview, he stated that he and other workers in the regular Bronx Democratic organization prepared the anonymous kit at the North End Club. He described his role as "stuffing envelopes" with the four leaflets. Gluckow volunteered the information that the North End Club had special "Irish, Italian and Jewish" mailing lists and that the "Communist Puppet" kit "probably went to the Irish list".

Councilman Thomas J. Cuite, the co-ordinator of the Levitt primary campaign in Brooklyn, admitted that the anonymous "Communist Puppet" kit was distributed in Brooklyn through the Levitt campaign headquarters in that borough.

Cuite said that on Friday, September 1, 1961 an unknown "printer" notified him by telephone that certain Levitt campaign literature could be picked up at a "printing or binding firm in Mount Vernon, New York". He said that since he was unable to make arrangements for a Friday pick-up the unknown "printer" said that he would leave the materials at a Democratic club in the Bronx "one block south of Fordham Road . . . right near Webster Avenue". According to Cuite, the following morning, September 2, he set out in search of this Democratic Club. By meticulously following the travel directions of the unknown "printer" Cuite said he arrived at the North End Democratic Club. Cuite further related that upon arrival at the club he was ushered into its executive offices and introduced to Philip Gilsten. Then Cuite said "In that room I asked if there was any material for the Levitt campaign for Brooklyn headquarters. And the gentleman whom I was speaking to called for some other man and

told him I was there to pick up the material for Brooklyn". This latter person, whom Cuite is unable to identify, then guided the Councilman to a public garage situated on an obscure sidestreet in the Bronx. Then Cuite and his unknown guide transferred nine cartons of Levitt campaign literature from a car parked in the garage to Cuite's automobile.

According to Cuite, it wasn't until the following Tuesday, September 5, that he discovered that the nine cartons contained three of the four leaflets included in the anonymous "Communist Puppet" kit. The Councilman said that he stored the closed cartons in the assembly room of Levitt's campaign headquarters in Brooklyn over the Labor Day weekend and they were not opened until September 5. Councilman Cuite said that he obtained the fourth anonymous leaflet in the "Communist Puppet" kit directly from a firm known as the Seminole Printing Corporation.

Cuite stated that Levitt's Brooklyn headquarters distributed the anonymous "Communist Puppet" literature to the borough's regular Democratic leaders for use in their home areas.

As noted previously, one of the anonymous circulars included in the "Communist Puppet" kit was a copy of an article appearing in "The Tablet", praising Comptroller Levitt's anti-communist activities. We have established that 100,000 copes of this anonymous circular were printed by Seminole Printing Corporation, Inc., 225 Varick Street, New York. Another 50,000 copies of the circular were printed by Printolith Corp., 118 East 25th Street, New York, at the request of the Seminole Corporation.

Joseph Cohen, the proprietor of Seminole was unable to explain the absence of any printer's or sponsor's identification on this circular. Max Weiss, the president of Printolith admitted the omission of any identification on the anonymous "Tablet" circulars he printed.

Appendix "A"

William Volet, Executive Assistant to Comptroller Levitt, placed the two orders with Seminole. There is no evidence that Volet instructed either printer to omit the identification required under the law.

Our investigation to determine the printer of the three other anonymous circulars included in the "Communist Puppet" kit has been temporarily delayed by an order of Justice George Tilzer of the New York State Supreme Court restraining the Attorney General from obtaining the books and records of the North End Democratic Club. In order to ascertain whether the North End Club ordered this anonymous literature we served Philip Gilsten on October 4, with a personal subpoena and a subpoena duces tecum calling for certain books and records of the Club. Gilsten did not appear at the Attorney General's office on the return date of the subpoena, October 6. On Sunday, October 8, Justice Tilzer signed an order to show cause why both subpoenas should not be vacated or modified. He also signed a stay order enjoining the Attorney General from taking "any steps or proceedings to compel the appearance of Gilsten" or the production of North End's books. The Attorney General is further restrained under this order from proceeding against Gilsten for contempt. As of this date the motion is still pending in Part I of the Supreme Court.

Upon interview Carmine DeSapio denied Mayor Wagner's charge that he "masterminded" the "Communist Puppet" kit. Our investigation has uncovered no evidence that DeSapio either "masterminded" or participated in any way in the distribution of this literature.

Levitt Charge

On August 31, 1961, Comptroller Levitt issued a public charge that campaign workers for Mayor Wagner had injected anti-Semitism into the Democratic primary con-

test. Comptroller Levitt said, "I have confirmed that 600 workers of the Sanitation Department are working in Queens . . . using the argument that a victory for Levitt will leave a Jew to run against a Jew—Levitt v. Lefkowitz". On the same date Levitt headquarters released a photographic copy of what a spokesman called a sample of the anti-Semitic literature allegedly distributed in Queens. This "Anti-Semitic" circular bore the legend:

IRISH AMERICAN DEMOCRATS
VOTE FOR WAGNER
On Primary Day
Thurs. Sept. 7th
3 PM to 10 PM
OR ELSE YOU WILL HAVE
A LEVITT OR A LEFKOWITZ AS MAYOR

The LEVITT headquarters identified Matthew Troy, Jr., Democratic Leader in the 9th Assembly District, Part A in Queens and Harold Fisher, Chairman of the Law Committee of the Brooklyn Democratic organization, to the press as the sources of these charges. This public statement received wide publicity in the metropolitan newspapers and appeared on page one of the New York Times on September 1.

On September 1, Comptroller Levitt sent a formal complaint to the Attorney General which stated in part that "groups have been busy going into the non-Jewish areas using the argument that unless Wagner is elected in the Primary 'the Jews will take over City Hall'.

"The history of this kind of campaign is not new in American politics. Every major Jewish figure has been subjected to it. I can recall instances in the past when this same vile literature—unattributed, irresponsible, bigoted in every respect—was used against Herbert Lehman . . . I am asking for nothing more than what he has always

asked—that the purveyors of this literature and the whispering hate mongers be stopped". (Underlining added by our staff)

To support this charge of the distribution of anti-Semitic literature the Comptroller attached as an exhibit "a photostatic copy of literature addressed to Irish-American Democrats"—the anonymous "Anti-Semitic leaflet to which we have previously referred. The Levitt complaint included no evidence in this matter beyond the naked charge and the copy of the "Anti-Semitic" leaflet. On the same evening the Comptroller appeared on NBC—TV and repeated the charge. At that time he once again exhibited a copy of the anonymous "Anti-Semitic" leaflet. Two days later, on September 3, Comptroller Levitt stated on the "Direct Line" television program, "these instances of anti-Semitic literature were brought to my attention from responsible sources" (underlining added by our staff).

Investigation of Levitt Charge

During the course of this inquiry into the anonymous "Anti-Semitic" circular over 100 witnesses were interviewed, including Frank Lucia, New York City Commissioner of Sanitation; a considerable number of Sanitation Department supervisors and employees active in the Wagner primary campaign; campaign advisors to the Mayor; registered Democratic voters in the 9th Assembly District in Queens; the Democratic leader of Part A of that Assembly District, Matthew Troy, Jr.; Harold Fisher, Chairman of the Law Committee of the Brooklyn Democratic organization; former Justice Daniel V. Sullivan, Levitt's campaign manager; William Van Heuvel, a Levitt campaign consultant; and Irwin Rosenthal, a researcher at Levitt headquarters at the Hotel Biltmore, Manhattan.

Appendix "A"

Our investigation established that in August, 1961 Sanitation Commissioner Frank Lucia organized a 9th A. D. Independent Citizens Committee for Wagner in the Queens Village area. About seventy persons, mainly Sanitation Department employees, "volunteered" or were recruited by the Uniformed Sanitationmen's Union as workers for this Committee. During the period before the September 7 primary this Wagner Committee conducted a highly organized camaign on behalf of the Mayor, including door-to-door canvassing and distribution of literature. The Levitt group charged that these campaign workers were making anti-Semitic arguments and distributing the anonymous "Anti-Semitic" circular.

Matthew Troy, Jr., identified by the Levitt group as the person who originally brought the "Anti-Semitic" circular to their attention gave sworn testimony before our staff on two occasions. Troy said that several weeks before the primary he began to receive reports that sanitation workers with the 9th A. D. Citizens Committee for Wagner, were making anti-Semitic arguments in door-to-door canvassing. He said that he transmitted these reports to Irwin Rosenthal, a member of the Levitt research staff. Troy further stated that, on the urging of Rosenthal, he went to regular Democratic headquarters in the Biltmore Hotel and repeated these reports to Levitt's campaign advisors.

He said that he was asked at that time whether any anti-Semitic circulars were being distributed in the Queens Village area. Troy said that he told the Levitt advisors that no such reports had been made to him. According to Troy he saw a copy of the "Anti-Semitic" leaflet for the first time on September 1 at Levitt headquarters in the Biltmore Hotel. The questioning of Troy was as follows:

> Q. Well, sometime before September 1st, when Mr. Levitt appeared on television with this exhibit did you

see an original of the circular at the Biltmore? A. Yes, I believe it was on September 1st that I saw it. . . .

Q. Did you bring that original to the Biltmore? A. No, I did not.

Q. Do you have any knowledge of how it arrived at the Biltmore? A. I have none whatsoever, except to say that was there in the room and showed to me when—after I had come into the room. I have no idea. idea.

Q. Who showed it to you? A. I don't remember now. I don't remember at all.

Q. Well, what did the people at the Biltmore have to say about the source of this literature? A. If I recall, I asked them where they got this piece of literature, and they said that the captains from the districts were bringing them in. And from the way they talked I assumed that they had more. I thought they had. Well, it was in my own mind, but I felt they had better than 20 of them. The way they said the captains were bringing them in. It seemed to be a multiple operation rather than just one, but the one they showed me was a very rolled up—it had been straightened out now, but it appeared to have rolled up and creased or it had been left lying somewhere, and a person might roll it up and throw it away.

On August 31, the Levitt headquarters released a copy of the "Anti-Semitic" circular to the press and on the following day this leaflet was exhibited over television by Comptroller Levitt.

Troy gave sworn testimony that on September 4th, five days after the "Anti-Semitic" circular exhibit was released by Levitt Headquarters, an unknown person brought a copy of this leaflet to his office at the Queens Village Democratic Club. Troy said that this was the first time he knew of any such circular in the Queens Village area. He

stated that he thought the bearer of this circular "might be planted or he might be being used by somebody to plant it in our area to give credence to the story that was being told." Troy stated that he brought the "Anti-Semitic" circular to Levitt headquarters on September 5 or 6. At that time, according to Troy, he told the Levitt campaign staff that he "doubted the authenticity of the piece of literature."

We have been advised by expert printers that the anonymous "Anti-Semitic" leaflet was an "amateur's job". These printers are of the opinion that the composition of the circular indicates that it was printed by an unskilled and inexperienced person.

Commissioner Lucia and all of the Sanitation Department employees interviewed, denied any knowledge of the printing or distribution of the anonymous "Anti-Semitic" leaflet. In fact, Lucia opined that the circular was an "opposition plant". Interviews by our field staff with registered Democratic voters in the 9th Assembly District in Queens uncovered no person who had received a copy of this anonymous leaflet.

Harold Fisher, Chairman of the Brooklyn Democratic Law Committee, identified by Levitt headquarters as a second complainant in this matter, was also interviewed by our staff. Fisher recalled receiving complaints about anti-Semitic arguments being used by Wagner workers. However, he was unable to identify any person who made such complaints. He further stated that he had no information about the distribution of the anonymous "Anti-Semitic" leaflet and saw it for the first time when Comptroller Levitt appeared on television on September 1.

We enlisted Comptroller Levitt's aid in tracing the source of the anonymous "Anti-Semitic" circular utilized in his public statement of August 31 and his television appearance of September 1. He referred our staff to

William Vanden Heuvel, a campaign advisor. Comptroller Levitt, in a letter to Special Assistant Attorney General Bonomi, dated October 19, 1961, stated, "I was handed the literature in my New York City Headquarters by Mr. William Vanden Heuvel".

Vanden Heuvel, upon interview, said that he had no personal knowlege how many copies of the "Anti-Semtic" circular arrived at Levitt Headquarters but speculated "I would presume it came from Matthew Troy or his captains, or the people in that area who received it. It possibly could have come anonymously in the mails as many things that crop up in campaigns unfortunately arrive".

No other campaign advisor at Levitt Headquarters was able to cast any light on the source of the anonymous "Anti-Semitic" leaflet. A few believe, however, that Matthew Troy, Jr., had reported the distribution of this literature in the Queens Village area prior to September 1.

Troy was also interviewed concerning the Levitt charge that anti-Semitic arguments were being used by Wagner workers in door-to-door campaigns. He said that two captains in his Assembly District reported the use of anti-Semitic arguments by Wagner campaign workers. However, Troy refused, under oath, to identify these captains or give any information about complaints of this nature in the Queens Village area. Only one of Troy's election captains, Salvatore Sciame, stated that he heard such reports. He said that unidentified customers of his grocery store told him "that somebody had approached them saying that it would be a situation (if Wagner lost the primary) where a Jew would be running against a Jew". Interviews by our staff in Sciame's election district failed to uncover any Democratic voter who heard anti-Semitic arguments being used by Wagner workers. The Sanitation Department personnel appearing before our staff denied any such activity.

• • • •

Appendix "A"

We will submit a *final* report at a later date concerning our further investigative findings, conclusions and legislative recommendations.

In closing this *interim* report, we wish to express our appreciation to the Attorney General for the cooperation afforded this investigation in generously providing office space and extensive clerical help. We might also note that the Attorney General has scrupulously adhered to his pre-investigation pledge to give our staff a "free hand" in the conduct of this inquiry.

APPENDIX "B"

Final Report

To: Honorable Louis J. Lefkowitz
Attorney General of the State of New York

From: John G. Bonomi
Special Assistant Attorney General
Counsel, New York City Fair Campaign Practices Committee

Re: Printing and Distribution of Anonymous Campaign Literature in 1961 Primary and General Elections in New York City

Introduction

This is the "Final Report" of the Attorney General's investigation into the printing and distribution of anonymous literature during the 1961 primary and general election campaigns in New York City. On November 3, 1961, we publicly released our "Interim Report".

In this report, we have incorporated additional investigative findings and our legislative recommendations. Our investigative findings concern campaign literature which may have been printed, distributed and financed in violation of § 781-b of the Penal Law and/or Article 13, §§ 320-328 of the Election Law (see Appendix I for full text of § 781-b, Penal Law). In addition, we have conducted two studies which suggest serious defects in Section 781-b.

Section 781-b provides criminal penalties for the printing of any campaign literature which does not identify either the printer or sponsoring organization.

Artcle 13 of the Election Law requires that "political committees" file detailed statements of all campaign receipts and expenditures (including those financial transactions which relate to the printing and distribution of campaign literature) with both the New York Secretary of

State and the New York City Board of Elections. A "political committee" is defined by this Article as any group of three or more persons cooperating to aid in the election or defeat of a political candidate (§ 320, Election Law).

Under § 776 of the Penal Law, a treasurer of a "political committee" who neglects to file the financial statement required by the Election Law is subject to criminal penalties. Any person who knowingly and willfully violates any other section of Article 13 is chargeable with a misdemeanor under § 783 of the Penal Law (see Appendix II for full texts of §§ 776 and 783, Penal Law).

Summary of Findings

In our November 1961 "Interim Report", we found no evidence, whatsoever, to support a complaint by the regular Democratic organization that an anonymous "Anti-Semitic" leaflet had been distributed by workers for Mayor Robert F. Wagner.

We did, however, establish that the regular Democratic organizations in the Bronx and Brooklyn distributed anonymous literature during the 1961 primary campaign implying that the Mayor was a "Communist Puppet". We further ascertained the identity of two printers responsible for the illegal printing of 150,000 copies of this anonymous literature (§ 781-b, Penal Law).

Now, in this "Final Report", we set forth the results of the following investigations and studies:

(1) *"Communist Puppet" Kit*

Since our "Interim Report" on "Communist Puppet" literature, we have obtained the *sworn* testimony of Philip Gilsten, a Bronx Democratic leader and Executive Member of the North End Democratic Club. Gilsten's sworn testimony confirmed our interim finding that the North End

Club acted as a distribution center for "Communist Puppet" circulars.

An examination of the records of the North End Club disclosed no evidence of expenditures for the printing of anonymous literature. However, these records were maintained by Gilsten in clear violation of those provisions of the Election Law which require detailed accounting of campaign receipts and expenditures.

(2) *"Wagner Committee"*

John J. Gilhooley, a Republican candidate for City Controller, denounced a political advertisement in the November 4 issue of the "Irish Echo", a weekly newspaper, as a "minority appeal". The ad was bare of sponsor's identification except for a line reading "Independent Citizens Committee for Wagner, Screvane and Beame".

Wagner Campaign Manager Edward P. Cavanaugh promptly disavowed the ad as "unauthorized" and "deplorable". Upon interview, Sean Keating, then Assistant to the Mayor, defended the ad as not "too outrageous".

Our inquiry revealed that the ad's sponsoring committee was conceived at a meeting between Keating and two friends at Wagner headquarters. Keating said that his overriding concern was whether "they had Wagner, Beame and Screvane's name" on the ad and claimed only a casual interest in the committee's activities after the first meeting. The evidence indicates that the committee was formed without the knowledge or authorization of the Mayor and subsequently operated independent of Wagner headquarters.

There are no provisions in the Penal or Election Laws governing the identification of sponsors of political ads appearing in newspapers, magazines and other periodicals. As a consequence, such a sponsoring group may remain anonymous or identify itself in a vague and misleading manner.

Appendix "B"

(3) *"Anonymous Posters"*

Our second study involved anonymous (but non-scurrilous) political posters exhibited in Democratic primary contests in the Yorkville and East Harlem areas of New York. These posters, which came to our attention during the interim investigation, supported the regular organization candidate for District Leader and City Councilman in those areas, John J. Merli. Our staff uncovered the printer and financer of these placards.

Under § 781-b of the Penal Law, a printer may be held criminally responsible for those anonymous posters which relate to the election of "public officers" such as city councilmen. However, he may not be prosecuted for printing anonymous placards which concern a district leader contest since elections of "party officers" are omitted from the provisions of Section 781-b.

(I)

INVESTIGATION RE: "COMMUNIST PUPPET" KIT

Philip Gilsten, Democratic leader in the Eighth Assembly District of the Bronx and Executive Member of the North End Democratic Club, had been interviewed at the North End Club on October 4. At that time, Gilsten readily admitted that an anonymous campaign packet implying that Wagner was a "Communist Puppet" was distributed in the Bronx under the auspices of the North End Democratic Club. He described the North End Club as a "drop" for a substantial portion of the Levitt campaign literature distributed in the Bronx. Gilsten further explained that all of the regular Democratic clubs in the Bronx used the North End's facilities for the "processing" of campaign material because of its spacious quarters and considerable experience in this activity.

Appendix "B"

Gilsten, in the October 4 interview, stated that workers from all of the regular Bronx Democratic clubs came to the North End Club to aid in the preparation of the anonymous "Communist Puppet" kit for distribution. He also reported that some of the anonymous kits were mailed directly from the North End Club, while others were circulated by the regular Democratic clubs in their own areas.

Gilsten, at that time, characterized the anonymous "Wagner Puppet" leaflet as "brilliant" in conception. He said the distribution of the anonymous kit was dictated by "politics" and commented, "we were fighting for our political life".

In order to obtain *sworn* testimony of Gilsten and ascertain whether the North End Club had ordered any of this anonymous literature, we served Gilsten, on October 4, with a personal subpoena and a subpoena duces tecum calling for certain books and records of his organization. Gilsten did not appear at the Attorney General's office on the return date of the subpoena, October 6. October 8, Justice George Tilzer signed an order to show cause in the New York State Supreme Court why both subpoenas should not be vacated or modified. Justice Tilzer also signed a stay order enjoining the Attorney General from taking "any steps or proceedings to compel the appearance" of Gilsten or the production of the North End's books. The motion was argued in Part I of the New York Supreme Court in October 10. On November 20, Justice Owen McGivern ordered Gilsten to appear at the Attorney General's office on November 28 and produce certain books and records of the North End Club.

On this latter date, Gilsten appeared and was examined under oath. Gilsten admitted, in his sworn testimony, that the North End Democratic Club acted as a distribution center for the anonymous "Communist Puppet" literature circulated in the Bronx.

Appendix "B"

Gilsten swore that he had no idea where the anonymous "Communist Puppet" literature was printed or how this material arrived at the North End Club. [It should be noted that during the interim investigation, we established that certain of this anonymous literature was ordered at the city-wide regular Democratic headquarters; printed by two New York City concerns; and that nine cartons of "Communist Puppet" kits were obtained by City Council man Thomas J. Cuite after a brief conference with Gilsten and his aides at the North End Club.]

Meager financial books and records were produced by Gilsten in response to the subpoena duces tecum. The North End Club's financial records consisted almost entirely of cancelled checks, bank statements and check stub books. However, a major portion of the club's 1961 primary campaign receipts and expenditures were in cash and non-recorded.

Gilsten acted as de facto treasurer for the 8th Assembly District's "Political Committee" (actually the North End Democratic Club) in the 1961 Democratic primary. He stated that he personally collected all monies contributed to the committee for the primary campaign and also supervised all expenditures.

As previously indicated, Article 13 of the Election Law makes the "treasurer" of a "political committee" responsible for maintaining certain financial records and filing prescribed statements with the Board of Elections and the Secretary of State. A record search showed that neither the "treasurer" nor any other person associated with the 8th Assembly District's "political committee" had filed a financial statement with the Secretary of State as required by § 324 of the Election Law.

This search also revealed a violation of § 325 of the Election Law in that no statement had been filed with the Secretary of State identifying the "treasurer" of the 8th A. D. "political committee".

Furthermore, § 325 as supplemented by § 327 of the Election Law requires the "treasurer" of a "political committee" to maintain a "detailed account" of all campaign receipts and expenditures, including a "receipted bill" stating the particulars of each expense. Gilsten's sworn examination revealed that he did not maintain ordinary business accounts and had no "receipted bills" for most expenses incurred.

The records produced by Gilsten established that Benjamin Gluckow, Secretary to Congressman Charles Buckley, filed a financial statement with the Board of Elections for the 8th A. D. "political committee' on September 28, 1961. However, this statement was contrary to the requirements of § 321 of the Election Law in that it was unsworn and failed to set forth the particulars prescribed by the statute.

No pre-primary financial statement was filed with the Board of Elections or the Secretary of State as required by § 323 of the Election Law.

(II)

STUDY RE: "WAGNER COMMITTEE"

The November 4 issue of the "Irish Echo", a weekly newspaper, situated at 1849 Broadway, New York County, contained a full page political advertisement which identified the sponsoring group as the "Independent Citizens Committee for Wagner, Screvane and Beame". No committee address or sponsoring member was listed.

This advertisement featured a headline which stated:

> "THE IRISH VOTER PUT KENNEDY IN THE WHITE HOUSE LET'S SEND WAGNER AND HIS TEAM BACK TO CITY HALL"

On November 5, John J. Gilhooley, the Republican candidate for City Controller, denounced the "Irish Echo" advertisement. He stated, "This Wagner advertisement is an insult to the Presidency of the United States; it is

an insult to President Kennedy himself who never made such minority appeals." Gilhooley exhorted the Mayor, "Don't drag us back into a time when 'we' meant a minority group in a racial or political or social ghetto."

Since the advertisement was not anonymous and appeared to accurately identify the sponsor as a "Wagner Committee", Gihooley's charge was not initially investigated by our staff. However, in response to an inquiry from the New York City Fair Campaign Practices Committee, Edward P. Cavanaugh, Mayor Wagner's campaign manager, stated that the sponsoring group was "unauthorized" and that Wagner headquarters "deplored this type of campaigning". At the request of the New York Fair Campaign Practices Committee, we thereupon initiated a study of this situation.

In the initial stages of this inquiry, we were informed by the editors of the "Irish Echo", that one John O'Donnell, a restaurant owner, whose home address was unknown, had ordered the ad. After considerable investigation we located O'Donnell, and he was examined under oath at the Attorney General's office concerning the make-up of the "Independent Citizens Committee for Wagner, Screvane and Beame". This portion of the examination proceeded as follows:

> "Q. You see at the bottom of that exhibit (advertisement in 'Irish Echo') there is 'Independent Citizens Committee for Wagner, Screvane and Beame'. Who are the people on that committee? A. Jim (Fitzpatrick) would know better than me.
>
> Q. Do you know? A. No. I'm a member of a committee in connection with that ad. I'm a member of a committee of three, I suppose you call it. That's the way it originated between Keating, Fitzpatrick and myself.

Q. As far as you know, the Committee is made up of Sean Keating, Fitzpatrick and yourself. A. Possibly.

Q. Don't you know? A. I know we were three of the members."

O'Donnell relayed that some time prior to the general election on November 7, 1961, he and James Fitzpatrick, a salesman, met with a long time friend, Sean Keating, then Assistant to the Mayor, at Wagner campaign headquarters in the Hotel Astor.

O'Donnell said that the purpose of this visit was to purchase tickets for a Wagner campaign banquet. However, during the course of the meeting, Fitzpatrick suggested that it would be "nice if we had a full page ad in the 'Irish Echo'" endorsing Mayor Wagner. Then, according to O'Donnell, Fitzpatrick volunteered to act as treasurer of the group; Keating wrote some innocuous advertising copy; and O'Donnell telephoned James A. Callahan, advertising agent of the "Irish Echo", to make preliminary arrangements for the advertisement.

O'Donnell said that at a later meeting in O'Donnell's restaurant, Callahan wrote the portion of the advertisement characterized by Gilhooley as a "minority appeal." O'Donnell stated that Callahan also "dreamt-up" the name to be given to the sponsoring group, "Independent Citizens Committee for Wagner, Screvane and Beame."

James Fitzpatrick, a district sales manager for a New York concern, gave sworn testimony in the "Wagner Committee" inquiry. Fitzpatrick stated that he had known Keating socially for about twenty years. His version of the meeting with Keating at the Hotel Astor was substantially the same as O'Donnell's. Fitzpatrick stated that his sole function with the committee was to act as treasurer.

Upon interview, James Callahan, the advertising agent for the "Irish Echo", stated that on October 26, 1961,

O'Donnell called him at the newspaper offices concerning a proposed political advertisement. Callahan said that he met the same day with O'Donnell and Fitzpatrick to make arrangements for the insertion of the ad in the "Irish Echo." Callahan's version of this meeting was brought out in the following questions and answers:

> "Q. Who suggested that the caption should be put on the advertisement 'Independent Citizens' Committee for Wagner, Screvane and Beame'? A. Well, I said, 'Now fellows, whose going to pay for this ad?' They said, 'We are.' I said 'O. K.' Now I had to have a source. They said 'Independent Citizens' Committee for Wagner, Screvane and Beam.'
>
> Q. Who said it? A. Both of them.
>
> Q. Mr. O'Donnell and Mr. Fitzpatrick? A. Yes."

Callahan further stated that he had written the "minority appeal" headline for the advertisement in order to give it "zip" and "a punch line."

Callahan said that the price of the ad was $400. John Grimes, the business manager of the "Irish Echo" stated that on December 1, Fitzpatrick paid for the advertisement with $395 in cash and a $5 check.

A search of the records of the Board of Elections and Secretary of State revealed that Fitzpatrick as "de facto treasurer" of an "informal committee for the placing of an ad in the 'Irish Echo' to support the re-election of Hon. Robert F. Wagner" (actually the so-called "Independent Citizens Committee for Wagner, Screvane and Beame") had filed the financial statements required of "political committees" under the Election Law. This statement identified eighteen persons who had allegedly contributed $350 and pledged $50 for the "Irish Echo" advertisement. The listed contributors included John J. O'Connor, a business associate of Keating's in the Fairways Travel Agency, 589 West 207th Street, New York County.

Further inquiry disclosed that the donors were all social or business friends of Keating, Fitzpatrick and O'Donnell. Several of the contributors stated that they made donations out of "friendship" rather than political conviction and that they were actually supporters of Lawrence Gerosa, a third-party candidate in the mayoralty race.

Sean Keating, former Assistant to the Mayor and now Regional Director of the United States Post Office was interviewed on November 15, 1961. Keating substantiated the statements of O'Donnell and Fitzpatrick concerning the initial meeting at the Hotel Astor. He denied any further active participation in the committee's work.

Keating defended the committee's ad, stating "I didn't see anything too outrageous. Just as long as they had Wagner, Beame and Screvane's name on there, that's what I was concerned with."

He said that even though the idea for sponsoring the "Irish Echo" advertisement originated in his office at Wagner headquarters, the committee was "unauthorized". He stated that Wagner Campaign Manager Cavanaugh "called me at my room and said 'who the hell put this ad in? Did we authorize that?' I said, 'No.' I said 'It was somebody else entirely.' So he was satisfied then because somebody had evidently brought it to his attention."

When Keating was asked whether he had ever made an inquiry concerning the full membership of the committee, he retorted, "No, because I knew that O'Donnell and 'Fitz' had taken the ad out and I assumed that they were the Independent Citizens because they're both independent and they're both citizens."

(III)

STUDY RE: "ANONYMOUS POSTERS"

During this investigation, we were informed that anonymous (but non-scurrilous) political posters were being

exhibited in the Yorkville and lower East Harlem areas of New York County. One of these posters depicted Carlos Rios, an "insurgent" primary candidate for Democratic Leader in the 10th Assembly District of New York County as a "puppet" of Assemblyman Mark Lane. Another anonymous poster showed Robert Low, an "insurgent" Democratic Councilman candidate in the 22nd Senatorial District as a "puppet" of Mayor Wagner. Both of these posters endorsed the candidacy of John J. Merli, the "regular" Democratic organization candidate in the District Leader and Councilman primaries.

A filed survey revealed that about thirty such anonymous posters were in evidence in these areas.

Further investigation revealed that Maxwell Mokut, Chairman of the "Independent Democrats for the Re-election of John J. Merli" had ordered and paid for these posters. Our investigation also established that David Schoer, the owner of Grenshaw Studios, 25 West 26th Street, New York County, drew the "puppet" cartoons featured on both posters; and that Henry Fuchs, a printer operating under the trade name of Sun Litho Art, 135 West 25th Street, New York County, printed "a thousand or two thousand" copies of these anonymous placards.

Upon examination, Fuchs stated that although he had printed political posters previously, "I don't put no identification on none of my printing."

Legislative Recommendations

We, in New York, are in the "horse and buggy age" in the consideration of legal weapons to combat *anonymous* "hate literature".

The great preponderance of campaign "hate literature" is ordered, printed and distributed in a furtive and conspiratorial manner. There is a compelling reason for this secrecy. The poltical leaders responsible for the dis-

semination of "hate literature" live in mortal fear of discovery by an aroused and enlightened electorate.

We believe that the most effective legal means for fighting hate peddlers is to remove their cloak of anonymity. If these persons are clearly identified, the voting public may avail itself of a potent weapon—retribution at the polls.

The constitutionality of the identification requirements of the Federal Corrupt Practices Act (which are substantially similar to those in the New York statute) has been upheld in *United States* v. *Scott* (U.S.D.C., Nor. Dak., 1961) not off. cit., 30 US.L.W. 2066, relying on *Communist Party* v. *S.A.C. Board* (1961), 367 U. S. 1.

Of course, the mere passage of a criminal statute requiring clear identification of the sponsors of campaign literature will not guarantee success. Those agencies responsible for the supervision of elections and prosecution of criminal offenders must be vigilant and dedicated. They must be ever ready to dig out those who print, distribute and finance anonymous campaign literature. And the voting public must be constantly alerted to such unfair campaign practices by a responsible and free press.

The only New York statute which even remotely bears on the problem is § 781-b of the Penal Law. This statute prohibits the *printing* of anonymous campaign circulars. However, Section 781-b is riddled with inequities and omissions. Thus, a political leader responsible for the *ordering* and *distributing* of anonymous campaign literature is immune from prosecution; anonymous political advertisements in newspapers, magazines and other periodicals are omitted from provisions of the statute; and anonymous circulars may be printed with impunity if they concern an election of a "party officer", such as a district leader.

It is true that the publisher of a written statement which defames an individual may be held criminally responsible (Penal Law, § 1341) and civilly liable. However, these

remedies are grossly inadequate where political candidates or public officials are the aggrieved parties. (See Defamation of Public Officers and Candidates, 49 Col. L. Rev. 875.)

The weaknesses inherent in these statutes are compounded by the administration of the election laws in the City of New York. Our investigation indicated that the Board of Elections has not exercised certain of its statutory powers.

For example, under § 38 of the Election Law, the Board "and any of the commissioners thereof may require any person to attend before the board or a commissioner at the office of the board or a branch office and be examined by the board or a commissioner as to *any matter* in relation to which the board is charged with a duty under this chapter or concerning violations of this chapter, or of the provisions of the penal law relating to the elective franchise, and may issue subpoena therefor . . ." (Emphasis by our staff.) Yet, even where violations of the Election and Penal Laws were apparent (i.e., printing of anonymous "Communist Puppet" literature and failure of the North End Club to file a pre-primary financial statement) the Board undertook no inquiry.

In view of the enumerated defects in the law and its administration, we are making the following legislative recommendations to the Attorney General:

1. That § 781-b of the Penal Law be amended to prohibit any person from "printing, publishing or distributing" anonymous campaign literature or "causing" such literature "to be printed, published or distributed".

As it stands, Section 781-b neither deters nor punishes those primarily responsible for anonymous campaign literature—the financier and distributor. Under the proposed amendment, persons who print, finance or distribute anonymous campaign literature, could be criminally prosecuted.

2. That Section 781-b be amended to require that campaign literature bears both the name and address of the printer *and* the name and address of the specific person and organization which ordered the ad.

The present statute is phrased in the alternative, requiring identification of the printer *or* "the person and committee at whose instance" the circulars were printed. Hence the sponsors may remain anonymous and comply with the law.

3. That Section 781-b be amended to provide criminal penalties for the printing, ordering or distribution of anonymous literature in campaigns for "party" as well as "public" office.

The present section applies to "any election of public officers, (or) candidates for nomination for public office"; i.e., general and primary elections for Mayor, City Councilman, etc. The statute does not proscribe the printing of anonymous literature in campaigns for "party office", such as district leader.

4. That Section 781-b be amended to prohibit newspapers, magazines and other periodicals from printing or publishing campaign advertisements which do not identify the person and committee sponsoring the ad by name and address.

Under the present law, sponsors of such ads may remain anonymous or identify themselves in a nebulous and misleading manner.

Our inquiry disclosed that most newspapers and other periodicals circulated in the New York City area require proper identification of sponsors of political advertisements. However, this voluntary practice is not universal. As a result of vague sponsor identification, the "Irish Echo" ad was initially attributed to Wagner headquarters and provoked charges of official Democratic endorsement

of a "minority appeal". Only painstaking investigation disclosed that the committee name was apparently the product of an advertising agent's imagination and the sponsoring group operating independent of Wagner headquarters.

We believe that any laxity on the part of agencies supervising the conduct of elections cannot be cured by legislative mandate. In this area, the need is not for additional laws, but for officials with an awareness of their powers and responsibilities under existing statutes.

The following Special Assistant Attorneys General participated in this investigation of anonymous campaign literature and the preparation of our interim and final reports: Manuel Guerreiro; Alexander Holtzman; Donald A. Hopper; Allan A. Pines; William Rand, Jr.; and Walter Wager.

Three investigators aided our staff in the conduct of field investigations: John L. Cronin, New York State Police; Charles M. Eidel, New York State Police; and James Malone, Election Frauds Bureau, Office of the Attorney General.

We wish to express our appreciation to Attorney General Louis J. Lefkowitz and State Police Superintendent Arthur Cornelius, Jr. for placing these investigators at the disposal of our staff. In addition, the Attorney General generously provided office space and clerical aid.

We wish to note that the Attorney General scrupulously adhered to his pre-investigation pledge to allow our staff a completely "free hand" in the conduct of this inquiry.

APPENDIX I

§ 781-b—Penal Law

"§ 781-b. *Printing or other reproduction of certain political literature.* No person shall print or reproduce in quantity by any method any handbill, pamphlet, circular, post card, placard or letter for another, which contains any statement, notice, information, allegation or other material concerning any political party, candidate, committee, person, proposition or amendment to the State Constitution whether in favor of or against such political party candidate, committee, person, proposition or amendment to the State Constitution, in connection with any election of public officers, candidates for nomination for public office, proposition or amendment to the state constitution without also printing or reproducing thereon legibly and in the English language the name and post-office address of the printer thereof or of the person and committee at whose instance or request such handbill, pamphlet, circular, post card, placard or letter is so printed or reproduced, and no person nor committee shall so print or reproduce for himself or itself any such handbill, pamphlet, circular, post card, placard or letter without also so printing or reproducing his or its name and post-office address thereon. A violation of the provisions of this section shall constitute a misdemeanor.

The term 'printer' as used in this section means the principal who or which by independent contractual relationship is responsible directly to the person or committee, at whose instance or request a handbill, pamphlet, circular, postcard, placard or letter is printed or reproduced by such principal, and does not include a person working for or employed by such a principal."

APPENDIX II

§§ 776 and 783—Penal Law

"§ 776. *Failure to file statement of receipts, expenditures and contributions.* Any candidate for election to public office, or any candidate for nomination to public office at a primary election, or any treasurer of a political committee as defined by the election law, who neglects to file, as required by the election law, a statement of receipts, expenditures and contributions shall be guilty of a misdemanor."

"§ 783. *Crimes against the elective franchise not otherwise provided for.* Any person who knowingly and wilfully violates any provision of chapter seventeen of the consolidated laws of this state, known as the election law, which violation is not specifically covered by any of the previous sections of this article is guilty of a misdemeanor."